TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 142

JAMES W. WUCHTER, PLAINTIFF IN ERROR,

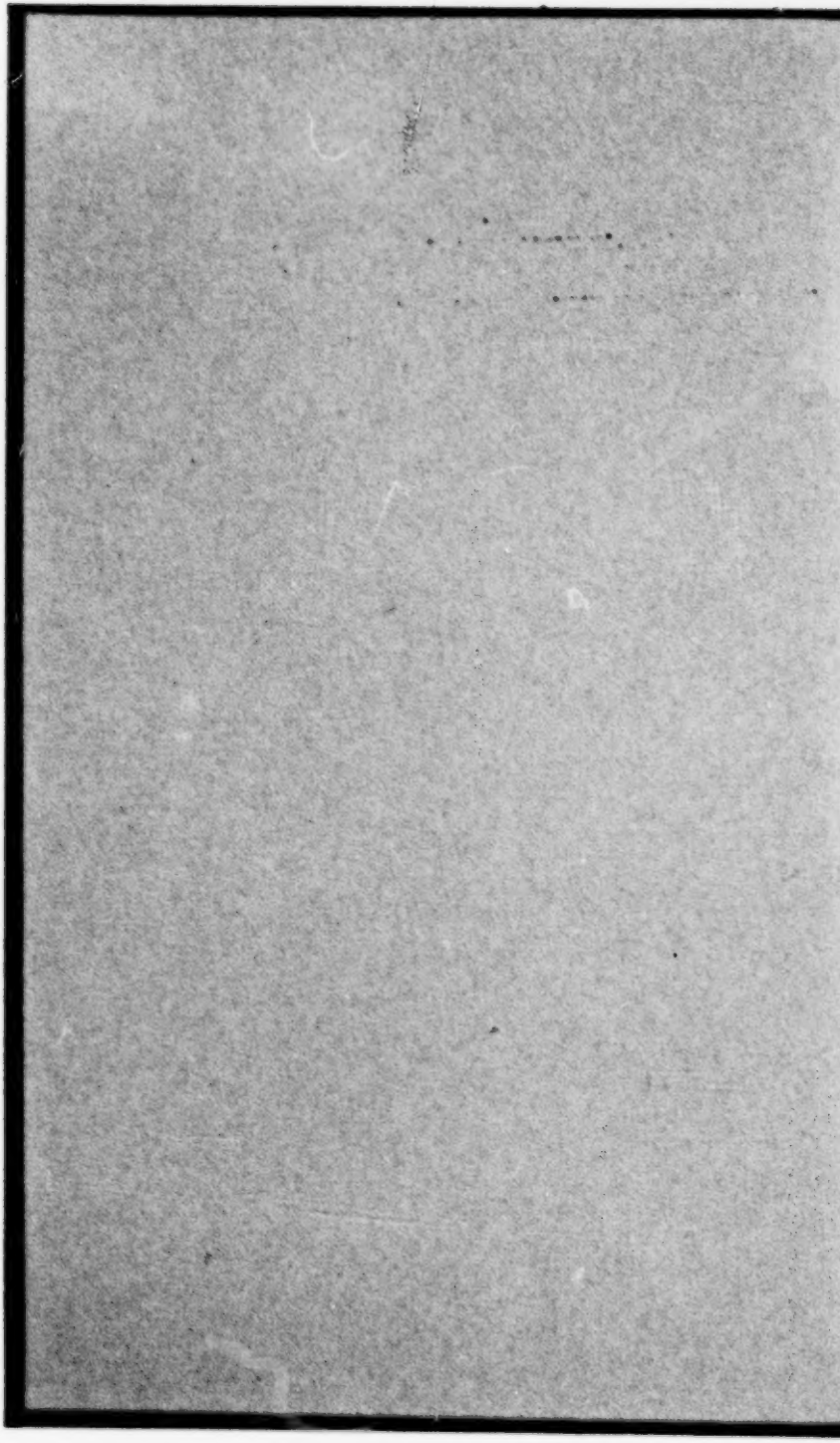
vs.

MICHAEL PIZZUTTI.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

FILED NOVEMBER 14, 1927

(32,306)



(32,296)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 729

JAMES W. WUCHTER, PLAINTIFF IN ERROR,

vs.

MICHAEL PIZZUTTI

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 1, 1927

[fol. 1]

IN SUPREME COURT OF NEW JERSEY

Judgment Record on Writ of Inquiry and Inquisition

SUMMONS

State of New Jersey to James W. Wuchter:

You are summoned to answer the annexed complaint of Michael Pizzutti in an action at law in the New Jersey Supreme Court. And take notice that unless you file your answer to the said complaint with the Clerk of the New Jersey Supreme Court, at Trenton, N. J., within twenty days after service upon you of this writ, and the annexed complaint the plaintiff may proceed in the suit and judgment be entered against you.

Witness William S. Gummere, Chief Justice of New Jersey Supreme Court, at Trenton, New Jersey, this 16th day of November, Nineteen Hundred and Twenty-five.

Edward J. Kelleher, Clerk. Jacob R. Mantel, Attorney. (L. S.)

[fol. 2] IN SUPREME COURT OF NEW JERSEY

MICHAEL PIZZUTTI, Plaintiff,

vs.

JAMES W. WUCHTER, Defendant

BILL OF COMPLAINT AND SHERIFF'S RETURN

First Count

Plaintiff, Michael Pizzutti, residing in the City of Summit, County of Union and State of New Jersey, says that:

1. On or about the 17th day of September, 1925, the plaintiff, Michael Pizzutti, was driving a team of horses on a public highway, known as Hawthorne Parkway, in the Township of Millburn, County of Essex and State of New

[fol. 1]

IN SUPREME COURT OF NEW JERSEY

Judgment Record on Writ of Inquiry and Inquisition

SUMMONS

State of New Jersey to James W. Wuchter:

You are summoned to answer the annexed complaint of Michael Pizzutti in an action at law in the New Jersey Supreme Court. And take notice that unless you file your answer to the said complaint with the Clerk of the New Jersey Supreme Court, at Trenton, N. J., within twenty days after service upon you of this writ, and the annexed complaint the plaintiff may proceed in the suit and judgment be entered against you.

Witness William S. Gummere, Chief Justice of New Jersey Supreme Court, at Trenton, New Jersey, this 16th day of November, Nineteen Hundred and Twenty-five.

Edward J. Kelleher, Clerk. Jacob R. Mantel, Attorney. (L. S.)

[fol. 2] IN SUPREME COURT OF NEW JERSEY

MICHAEL PIZZUTTI, Plaintiff,

vs.

JAMES W. WUCHTER, Defendant

BILL OF COMPLAINT AND SHERIFF'S RETURN

First Count

Plaintiff, Michael Pizzutti, residing in the City of Summit, County of Union and State of New Jersey, says that:

1. On or about the 17th day of September, 1925, the plaintiff, Michael Pizzutti, was driving a team of horses on a public highway, known as Hawthorne Parkway, in the Township of Millburn, County of Essex and State of New

Jersey, and was driving the said team of horses on the right side of said road in a careful and prudent manner.

2. At the same time and place as mentioned in paragraph one hereof, the defendant was driving an automobile in a rapid, careless and negligent manner and without any warning crashed into the rear of the said wagon, which the [fol. 3] plaintiff was driving and upon which the plaintiff was seated.

3. As a result of the negligence of the defendant, the plaintiff, Michael Pizzutti, sustained severe and permanent injuries and he suffered to a great extent both physically and mentally and was obliged to remain away from his employment for a long period of time in an endeavor to cure the injuries to his body, limbs and nervous system and will in the future be handicapped for life as a result of said injuries.

Second Count

Paragraphs one and two of the first count are hereby repeated and made paragraphs one and two of the second count.

3. As a result of the carelessness and negligence of the said defendant, James W. Wuchter, the horses, wagon and harness of the plaintiff were greatly damaged to the loss of the plaintiff herein.

Third Count

Paragraphs one and two of the first count are hereby repeated and made paragraphs one and two of the third count.

3. As a result of the carelessness and negligence of the defendant, James W. Wuchter, the plaintiff was obligated to hire a team of horses and wagon in order to conduct his [fol. 4] business to his great damage.

Plaintiff demands as damages on the first count in the sum of $1,500, the sum of $1,000 on the second count and the sum of $500 on the third count.

Jacob R. Mantel, Attorney for Plaintiff.

I hereby deputize and appoint George B. Hulit of Pennington, N. J., a Special Deputy, to serve the within writ and make return thereto. Witness my hand and seal this 19th day of Nov. A. D. 1925.

Chas. Reichert, Sheriff of Mercer County. (L. S.)

Served within Summons and Complaint November 19th, A. D. 1926, upon James W. Wuchter, Deft., by leaving a copy of the same in the office of the Secretary of State, N. J., with Ernest R. Kerr, Chief Clerk in said Office (the Secretary of State being absent from his office), with a service fee of Two Dollars.

Charles H. Reichert, Sheriff.

Sheriff's Fees	$3 62
Sec. of State	2 00
	$5 62

[fol. 5] In Supreme Court of New Jersey

[Title omitted]

Rule for Judgment Interlocutory by Default. January 6, 1926

The summons and complaint in this cause having been duly served upon the defendant on November 19th, 1925, and defendant having failed to file an answer or take any other step in response to the complaint, within the time limited by the rules of Court:

It is ordered that Judgment interlocutory be entered against the defendant, James W. Wuchter, and in favor of the plaintiff, Michael Pizzutti, and that a writ of inquiry do issue, directed to the Sheriff of the County of Union, to assess the damages which the plaintiff has sustained.

On motion of

Jacob R. Mantel, Attorney for Plaintiff.

Rule entered this 6th day of January, 1926.

[fol. 6] In Supreme Court of New Jersey

[Title omitted]

Notice of Writ of Inquiry and Affidavit of Service.—Filed February 19, 1926

Sir: Take notice that a writ of inquiry of damages will be executed in this cause, on Wednesday the 27th day of January next, at 10:30 o'clock in the forenoon of that day, at the Court House at the City of Elizabeth.

Yours, etc., Jacob R. Mantel, Attorney for Plaintiff.

To James W. Wuchter, Defendant.

[fol. 7] State of Pennsylvania,
County of Lehigh, ss:

On this sixteenth day of January, 1926, personally appeared before me John H. Diefenderfer, who being by me duly sworn according to law, deposes and says that he is over the age of twenty one, and that he served a copy of the within notice personally upon James W. Wuchter, at his residence 103 S. Madison Street, Allentown, Pa., the day and year first above written.

John H. Diefenderfer.

Sworn and subscribed before me this 18th day of January, 1926. Ruth C. Ricker, Notary Public. My commission expires Jan. 15, 1927. (Seal.)

[fol. 8] [Title omitted]

Affidavit of Jacob R. Mantel

State of New Jersey,
County of Union, ss:

Jacob R. Mantel, of full age, being duly sworn according to law on his oath, deposes and says:

I am the attorney for the plaintiff in the above entitled matter. I caused to be served upon James W. Wuchter,

the defendant herein, a notice of the execution of the writ of inquiry in this matter and also a notice of motion to enter up judgment final in this matter. I paid to John H. Diefenderfer, the sum of five dollars ($5) for his services in connected with serving these papers upon the defendant. It was necessary to make this service out of the State of New Jersey, to wit, Allentown, Pennsylvania, the residence of [fol. 9] the defendant. I therefore request that the sum of $5 be included in the tax costs in this mater.

Jacob R. Mantel.

Sworn and subscribed to before me this 17th day of February, 1926. (Signature illegible.) An Attorney at-law of New Jersey.

In Supreme Court of New Jersey

Writ of Inquiry—Filed February 18, 1926

State of New Jersey,
Union County, ss:

An inquisition, intended and taken at the Court House in Elizabeth, in the County of Union, on the Twenty seventh day of January, A. D., 1926, before Harry Simmons, Sheriff of the County of Union, by virtue of the Writ of Inquiry to the said Sheriff directed and to this inquisition annexed, to inquire of certain matters in the said writ specified by the oath of George Carroll, William Runyon, Raymond Bolle, Moe Lowy, Walter Scholes, Charles Lieb, Theodore Pfarrer, Harry Woelfel, Moses Fletcher, Fred W. Marhart, William F. Krauss, John J. Lawrence, honest and lawful men of said County, who, upon their oath and affirmation aforesaid, say:

That they find in favor of the plaintiff, Michael Pizzutti, [fol. 10] and against the defendant, James W. Wuchter, in the sum of Seven Hundred and Seventy Dollars and Twenty five cents ($770.25) as follows:

Loss of services, 6 weeks at $90 per week	$540 00
Injuries to horse	150 00
Harness	65 00
Repair to wagon	10 25
Dr. Tator, medical bill	5 00
	$770 25

In witness whereof, as well I, the said Sheriff as the said Jurors, have hereto set their hands and seals to this inquisition, the day and year above written.

Harry Simmons, Sheriff. Geo. T. Carroll (L. S.), Theo. Pfarrer (L. S.), Wm. Runyon (L. S.), Harry Woelfel (L. S.), Raymond Bolle (L. S.), M. Fletcher (L. S.), Moses Lowy (L. S.), Fred W. Marhart (L. S.), Walter Scholes (L. S.), Wm. F. Krauss (L. S.), Chas. O. Lieb (L. S.), J. L. Lawrence (L. S.).

[fol. 11] Union County, ss:

The State of New Jersey to the Sheriff of the County of Union, Greeting:

Whereas James W. Wuchter was summoned to appear in the New Jersey Supreme Court, Union Circuit,
(Seal) to answer unto Michael Pizzutti, in an action at law for that, on or about the 17th day of September, 1925, the defendant drove his automobile in a careless, negligent and reckless manner on a public highway known as Hawthorne Parkway, Millburn Township, County of Essex and State of New Jersey, and as a result thereof crashed into the horses and wagon that the plaintiff was driving carefully on said highway, damaging the plaintiff therefor and plaintiff demanding as damages the sum of ($3,000) Three Thousand Dollars, and such proceedings were thereupon had in our said Court that the said Michael Pizzutti ought to recover against the said James W. Wuchter, his damages on occasion of the premises: But because it is unknown to our said Court what damages the said Michael Pizzutti hath sustained by reason thereof, therefore we command you that by the oath, or if conscientiously scrupulous of taking an oath, by the solemn affirmation of

twelve good and lawful men of your county, you diligently inquire what damages the said Michael Pizzuti hath sustained, as well by reason of the premises, as for his costs and charges by him about his suit in this behalf expended. [fol. 12] And that you send to our said Court, before our Judge thereof, at Trenton, on the third Tuesday of Feb. next, the inquisition which you shall thereupon take, under your seal and the seals of those by whose oath or affirmation you shall take the inquisition, together with this writ.

Witness William S. Gummere, Esq., Chief Justice of the New Jersey Supreme Court, at Trenton, the sixth day of January in the year of our Lord, One thousand nine hundred and twenty-five.

Edward J. Kelleher, Clerk. Jacob R. Mantel, Attorney.

[fol. 13] [File endorsement omitted.]

[fol. 14] In Supreme Court of New Jersey

[Title omitted]

Notice of Motion for Final Judgment—Filed February 19, 1926

Sir: Take notice that the writ of inquiry of damages issued in the above entitled cause has been executed and returned; and that on Saturday, the 13th day of February, 1926, I will move before Honorable Samuel Kalisch, Justice of the New Jersey Supreme Court, at his chambers, 738 Broad Street, Newark, New Jersey, for an order to enter final judgment thereon.

Yours, etc., Jacob R. Mantel, Attorney of Plaintiff.

To James W. Wuchter, Defendant.

[fol. 15] State of Pennsylvania,
County of Lehigh, ss:

On the 9th day of February, 1926, before me the subscriber, a Notary Public, in and for said County and State, personally appeared John H. Diefenderfer, who, being duly

sworn according to law, deposes and says that he served a copy of the within notice on James W. Wuchter on the 1st day of February, 1926, by handing him a copy of said notice personally at his residence No. 103 S. Madison St., Allentown, Pa., and making known to him the contents thereof.

John H. Diefenderfer.

Sworn and subscribed before me this 9th day of Feb., 1926. Helen R. Larkin, Notary Public. My commission expires July 10, 1929. (Seal.)

[fol. 16] In Supreme Court of New Jersey

[Title omitted]

Rule for Entry of Final Judgment. Filed February 19, 1926

The writ of inquiry in the above stated cause having been duly issued and returned and it appearing thereby that there is due to said plaintiff from the said defendant, the sum of Seven Hundred Seventy Dollars and Twenty five cents ($770.25);

It is, on motion of Jacob R. Mantel, attorney for the above named plaintiff, ordered that judgment final be entered in the above stated cause in favor of the plaintiff and against the defendant for the sum of Seven Hundred Seventy Dollars ($770.25) and Twenty five cents, besides costs to be taxed.

Let the above order be entered in the minutes of the Court.

Dated February 13th, 1926.

Samuel Kalisch, Justice of the New Jersey Supreme Court.

Rule actually entered February 19, 1926.

Jacob R. Mantel, Attorney for Plaintiff.

[fol. 17] [Endorsement omitted.]

[fol. 18] IN SUPREME COURT OF NEW JERSEY

FINAL JUDGMENT

Plaintiff served and filed his complaint, but defendant failed to file an answer or take any other step in response to the Complaint, and thereupon a writ of inquiry was duly issued to assess the damages of the plaintiff, and after due proceedings thereon the damages of said plaintiff were duly assessed by the verdict of the jury upon said writ of inquiry, at the sum of $770.25, and the Court having ordered final judgment entered on said writ of inquiry and inquisition pursuant to the Statute.

Whereupon it is adjudged that the plaintiff, Michael Pizzutti, recover of the defendant, James W. Wuchter, the sum of Eight Hundred Fifty six Dollars and Forty seven cents, and his costs, which are taxed at the sum of Eighty-six Dollars and Twenty two cents, making in the whole the sum of Eight Hundred Fifty six Dollars and Forty seven cents.

Judgment entered February 19, 1926.

William S. Gummere, C. J.

$770	25
86	22
$856	47

[fol. 19] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

NOTICE OF APPEAL AND GROUNDS THEREFOR.—Filed March 11, 1926

To Jacob R. Mantel, Esq., Attorney of Plaintiff:

Take notice that the defendant, James W. Wuchter, a resident and citizen of Allentown, in the State of Pennsylvania, does hereby appeal from the whole and every part of the final judgment entered in the above entitled cause in the New Jersey Supreme Court the nineteenth day of February, 1926, to the New Jersey Court of Errors and Appeals, in the last resort in all causes.

Further take notice the said defendant does hereby specify the following as his grounds of appeal:

(1) Because the New Jersey Supreme Court did not have jurisdiction over this defendant because process was not served personally upon this defendant in the State of New Jersey, and he did not appear in this action.

(2) The New Jersey Supreme Court was without jurisdiction over the defendant because Chapter 232 of an Act [fol. 20] of the Legislature of the State of New Jersey of 1924, under the terms of which the New Jersey Supreme Court claimed to have and exercised jurisdiction over the defendant in an action in personam, was repugnant to the Fourteenth Amendment of the Constitution of the United States, Section One, in that it deprives the defendant of liberty and property without due process of law and is therefore void.

(3) The New Jersey Supreme Court was without jurisdiction over the defendant because Chapter 232 of an Act of the Legislature of the State of New Jersey of 1924, under the terms of which the New Jersey Supreme Court claimed to have and exercised jurisdiction over the defendant in this action, is repugnant to the Fourteenth Amendment of the Constitution of the United States, Section One, in that it abridges the privileges and immunities of citizens of the United States and is therefore void.

(4) The New Jersey Supreme Court was without jurisdiction over the defendant because Chapter 232 of an Act of the Legislature of the State of New Jersey of 1924, under the terms of which the New Jersey Supreme Court claimed to have and exercised jurisdiction over the defendant, is repugnant to the Fourteenth Amendment of the Constitution of the United States, Section One, in that it denies to persons within the jurisdiction of the State of New Jersey equal protection of the laws and is therefore void.

(5) The New Jersey Supreme Court did not have juris- [fol. 21] diction over the defendant, a citizen of the State of Pennsylvania, because process was not served upon the defendant personally in the State of New Jersey, but serv-

ice thereof was attempted to be acknowledged by the Secretary of State of the State of New Jersey, pretending to act in compliance with the provisions of Section 3 of Chapter 232 of an Act of the Legislature of the State of New Jersey of 1924, and that any such attempt to pretended service was void and repugnant to the Fourteenth Amendment to the Constitution of the United States and deprives this defendant of liberty and property without due process of law.

(6) The New Jersey Supreme Court was without jurisdiction over the defendant because Chapter 232 of an Act of the Legislature of the State of New Jersey of 1924, under the terms of which the New Jersey Supreme Court claimed to have and exercised jurisdiction over the defendant, was repugnant to Article IV, Section 2 of the Constitution of the United States, in that it deprived this defendant of all privileges and immunities of the citizens in the several States, and is therefore void.

For all of which matters defendant prays that the said judgment in the New Jersey Supreme Court may be reversed and set aside.

Dated March 8th, 1926.

McDermott, Enright & Carpenter, Attorneys for Defendant Appellant, specially appearing for the purpose of prosecuting this appeal and for no other purpose.

[fols. 22 & 23] [File endorsement omitted.]

Service of a copy hereof is hereby acknowledged this 9th day of March, 1926.

Jacob R. Mantel, Attorney of Plaintiff Appellee.

[fol. 24] In Court of Errors and Appeals of New Jersey

No. 68. May Term, 1926

Michael Pizzutti, Plaintiff Respondent,

vs.

James W. Wuchter, Defendant Appellant

Argued May 20th, 1926. Decided October 18th, 1926

Opinion—Filed October 18, 1926

P. was driving a team of horses attached to a wagon on a public highway in this State. W. a resident of Pennsylvania, was driving his automobile in the same direction on said highway. W. drove his car so it crashed into the rear of P.'s wagon, injuring P., damaging his wagon, and injuring his horses. P. instituted suit against W. in the Supreme Court. W. was served with process under the provisions of the act known as Chapter 232 of the Laws of 1924 (P. L. 1924, p. 517). W. interposed no defense. Judgment interlocutory was taken against him. A writ of inquiry was issued. Notice of its proposed execution was served personally upon W. in Penna. W. did not appear. Judgment final was entered. W. then appealed to this Court contending that the said act under which process was served upon him was unconstitutional because it deprived him of his property without due process of law in contravention of the rights guaranteed him by Section 1 of the 14th Amendment to the Federal Constitution and by Section 2 of Article IV of the same document. Held that Chapter 232 of the Laws of 1924 (P. L. 1924, p. 517) is constitutional.

On Appeal from the Supreme Court

For the Defendant Appellant: McDermott, Enright & Carpenter, Esqrs., James D. Carpenter, Jr., Esq., of Counsel.

For the Plaintiff Respondent: Jacob R. Mantel, Esq.

The opinion of the Court was delivered by

KATZENBACH, J.:

This is an appeal from a judgment of the Supreme Court. The appellant was the defendant below. The cause of action arose out of a collision between vehicles owned and operated at the time of the accident by the plaintiff and defendant. On September 17th, 1925, Michael Pizzutti, the plaintiff below (hereinafter referred to as the plaintiff) was driving a team of horses on a public highway in the Township of Millburn, in Essex County. James W. Wuchter, the defendant below (hereinafter referred to as [fol. 25] the defendant) as driving an automobile in the same direction as the plaintiff was driving. The automobile approached the rear of plaintiff's wagon, and as claimed by the plaintiff, was so negligently operated that it crashed into the rear of plaintiff's wagon, injuring the plaintiff, damaging the wagon and harness, and injuring the horses. The plaintiff resided in Union County. The defendant was a resident of Allentown, Pennsylvania. The plaintiff instituted an action in the Supreme Court against the defendant to recover the damages he had sustained as a result of the accident. The venue was laid in Union County, the residence and domicile of the plaintiff. The defendant being a non resident of New Jersey, service of process was made upon the Secretary of State in pursuance of the provisions of Chapter 232 of the Laws of 1924 (P. L. 1924, p. 517). The provisions of Section 1 of said act under which process was served are as follows:

"1. From and after the passage of this act any chauffeur, operator, or owner of any motor vehicle, not licensed under the laws of the State of New Jersey, providing for the registration and licensing of motor vehicles, who shall accept the privilege extended to non resident chauffeurs, operators, and owners by law of driving such a motor vehicle or of having the same driven or operated in the State of New Jersey, without a New Jersey registration or license, shall by such acceptance and the operation of such automobile within the State of New Jersey, make and constitute the Secretary of State of the State of New Jersey, his, her, or their agent for the acceptance of process in any civil

suit or proceeding by any resident of the State of New Jersey against such chauffeur, operator, or the owner of such motor vehicle arising out of or by reason of any accident or collision occurring within the State in which a motor vehicle operated by such chauffeur, or operator, or such motor vehicle is involved."

The defendant interposed no defense. Judgment interlocutory was entered. A writ of inquiry directed to the Sheriff of the County of Union was issued. Notice of the execution of the writ of inquiry was served upon the defendant personally at his residence in Allentown, Pennsylvania. The defendant did not appear in person or by attorney at the inquisition. The jury summoned found in favor of the plaintiff and judgment for the amount found and taxed costs was duly entered. This judgment the defendant now appeals to this Court.

While the defendant has filed six grounds of appeal they merely state in different verbiage one ground for reversal, namely, that the act (Chapter 232 of the Laws of 1924) [fol. 26] under which the plaintiff claims that the Supreme Court had jurisdiction over the defendant is unconstitutional in that it deprives the defendant of his property without due process of law in contravention of the rights guaranteed to him by Section 1 of the 14th Amendment of the Federal Constitution, and by Section 2 of Article IV of the same document.

To support the contention that the act of 1924 is unconstitutional the appellant relies upon a line of decisions in the Federal Courts, of which the leading case is Pennoyer vs. Neff, 95 U. S. 714, to the effect that under Section 1 of the 14th Amendment of the Federal Constitution service on a non-resident by publication, or upon an agent who has not been specifically authorized to receive service for the non-resident deprives such non-resident of property without due process of law where the Court has attempted to render a personal judgment against the non-resident. We do not question the correctness of these decisions. We have recognized the soundness of the reasoning upon which they are based by following them in opinions rendered in this Court, as for example, in the cases of Blessing vs. McLinden, 81 N. J. L. 379, and Redzina vs. Provident Institution for Sav-

ings in Jersey City, et al., 96 N. J. E. 346. We think, however, that in the instant case there exists a feature not existing in the line of cases mentioned which differentiates the present case from the line of cases mentioned. This ground of differentiation is the power of the State to prohibit a non resident from doing acts within the State dangerous to life and property, unless such non resident consents to the exercise of jurisdiction over him in our Courts in causes of action growing out of the commission of such acts within this State. In other words it is the exercise of the police power of the State in the interest of public safety.

The use of the automobile has rapidly increased. The costly systems of improved roads, which almost every State has undertaken to build in the past few years, has been a factor in increasing the number of users of cars. There are many who seem to do nothing but tour the country from east to west and from north to south. They appear to live [fol. 27] in their automobiles. A car is no longer deemed merely a convenience. It is in the life of today a necessity. With the increase in the number of automobiles upon our highways there has been a corresponding increase in the number of accidents. The automobile is an instrument highly dangerous in its use when improperly operated. A driver with a good eye, steady hand, and good judgment, calmly exercised, is necessary to insure the careful operation of an automobile. Most accidents are due to speed. The speed which a car can quickly attain also makes it relatively easy for a driver involved in an accident to make good his escape. These conditions undoubtedly prompted the Legislature of this State to enact the statute under consideration to protect the persons and property of its citizens from injury caused by non residents who operate automobiles within the state. By this legislation is a non resident deprived of his property without due process of Law? We think not. It was held in the case of Kane vs. New Jersey, 81 N. J. L. 594, affirmed in 242 U. S. 160, that a State could without violating the Constitution of the United States, forbid a non resident to operate an automobile within the State, unless he had authorized a State official to receive service of process in actions instituted against him which were the result of the operation of his car within the State. This decision was the result of a law enacted by this

State which provided that no person, whether a resident or non-resident, should drive an automobile upon a public highway of the State unless the automobile should have been registered under the statute, and that a non-resident owner should appoint the Secretary of State his attorney upon whom process might be served in any action or legal proceedings caused by the operation of his registered motor vehicle, within this State, against such owner. The act prescribed a penalty for its violation. Kane, a resident of New York, failed to comply with the statute and was arrested in this State while driving his car from New York to Philadelphia. Kane claimed the statute invalid on the same grounds as advanced in the present case. Kane was convicted. The conviction was affirmed by the Supreme Court, this Court, and the United States Supreme Court. In delivering the opinion in the U. S. Supreme Court, Mr. Justice Brandeis [fol. 28] said:

"We know that ability to enforce criminal and civil penalties for transgression is an aid to securing observance of laws. And in view of the speed of the automobile and the habits of men, we cannot say that the Legislature of New Jersey was unreasonable in believing that ability to establish, by legal proceedings within the State, any financial liability of non-resident owners, was essential to public safety. There is nothing to show that the requirement is unduly burdensome in practice. It is not a discrimination against non-residents, denying them equal protection of the law. On the contrary, it puts non-resident owners upon an equality with resident owners."

This case settled the proposition that a state may constitutionally forbid a non-resident from operating an automobile within the State unless he expressly authorized an official of the State to accept service of process in suits growing out of the operation of his automobile within the State.

The statute under consideration is but another method of reaching the same result. It does not require a non-resident to expressly authorize the acceptance of process upon him by deputizing an official to act as his attorney for such purpose, but provides that if he does operate an automobile within the State this act upon his part shall be equivalent

of the express appointment under the statute declared valid in Kane vs. New Jersey, supra, for service of process in actions arising in this State from the operation of his motor vehicle. It substitutes an implied consent for the express consent. Instead of requiring the non-resident to stop at the border of the State and obtain permission to enter the State, which is granted upon conditions, the non-resident is allowed to enter subject to the same conditions. It is a quicker and easier method of obtaining the result desired, namely, jurisdiction of our courts over the non-resident in actions arising out of the operation of the automobile within the State. A non-resident is presumed to know the law. He is chargeable with knowledge of the laws of a State into which he brings his automobile so far as they affect the use of his car while in the foreign state.

We think the basis of jurisdiction in the present case over the defendant, who was not a citizen of this State, not served with process within the state, and who has not expressly consented to the exercise of jurisdiction of our [fol. 29] courts over him, rests upon the doctrine that a State may, without violating any constitutional limitation, forbid the doing of certain acts within the State unless and until the person who does the acts has consented to the jurisdiction of the courts of the State as to causes of action growing out of the doing of such acts within this State. It is within the power of a State to provide by law that the doing of such acts by a non-resident as the State can prohibit shall subject the non-resident doing them to the jurisdiction of our courts as to such actions as arise within the territorial limits of the State.

This is the same theory which has been applied to other fields of law to give a state jurisdiction in matters arising within the State. It has been quite common for a state to forbid the transaction of business by a foreign corporation within its borders unless the corporation submits to service of process upon it in the manner fixed by statute in actions brought against it which have arisen within the State. In such cases the corporation, by doing business in the foreign state, accepts the conditions and submits itself to the jurisdiction of the Courts of the State in the same manner as does the non-resident automobile owner

or operator who brings his car within the State for operation on our Highways.

It is urged that such a statute as the one being considered is a hardship upon a non-resident because it requires him to come to a foreign state to defend an action which may be without merit. This argument is easily answered by saying that the burden upon the non-resident is no greater than upon the citizen of a state who has suffered an injury or damage within the State of his domicile at the hands of a non-resident automobile owner or operator and who may be obliged to go to a foreign state, as for example, California to institute his suit for damages for an accident which arose through the courtesy of his State in extending to a non-resident the use of its highways. Such laws as the one under consideration seem but the reasonable exercise of the rights of a state for the protection of [fols. 30 & 31] its own citizens. If non-residents feel the law harsh they can easily avoid its operation, so far as they are concerned, by refraining from operating their automobiles within the territorial limits of the States which have enacted such laws.

These views are but an amplification of the views expressed by Mr. Justice Campbell in the case of Martin vs. Condon, 125 Atl. Rep. 738 (not yet officially reported) upon a motion to set aside service of process made under Chapter 232 of the Laws of 1924. In the opinion in that case reference is made to the case of Powloski vs. Hoss, 144 N. E. Rep. 700, which upholds a Massachusetts statute similar in its provisions to the act of this State.

This disposes of the single question argued, namely, whether Chapter 232 of the Laws of 1924 is unconstitutional.

The judgment of the Supreme Court is affirmed.

[File endorsement omitted.]

[fols. 32-40] In Court of Errors and Appeals of New Jersey

[Title omitted]

Order of Affirmance—Filed October 27, 1926

The defendant appellant, having appealed to this Court from a judgment rendered in the Supreme Court (Union Circuit) in the sum of Seven Hundred Seventy Dollars and Twenty-five Cents ($770.25) and Eighty-six Dollars and Twenty-two Cents ($86.22) costs, making a total of Eight Hundred Fifty-six dollars and forty-seven cents ($856.47) and the Court having considered said appeal and being of the opinion that the judgment of the Supreme Court should be affirmed, it is on this eighteenth day of October, 1926,

Ordered, that the judgment of the Supreme Court (Union Circuit) be and the same is hereby affirmed with costs and the record be remitted to the Court below to be proceeded with according to law and the practice of said Court.

Rule entered this — day of October, 1926.

On motion of

Jacob R. Mantel, Attorney for Plaintiff Respondent.

[File endorsement omitted.]

[fol. 41] In Court of Errors and Appeals of New Jersey

Writ of Error

United States of America, ss:

[Seal District Court of the United States, District of New Jersey.]

The President of the United States to the Honorable Judges of the New Jersey Court of Errors and Appeals, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said New Jersey Court of Errors and Appeals before you, or

some of you, being the highest court of law or equity of said State in which a decision could be had in the said suit between Michael Pizzutti, plaintiff-respondent, and James W. Wuchter, defendant-appellant, wherein was drawn in question the validity of a statute of the State of New Jersey, to wit, Chapter 232 of the Laws of 1924, on the ground of its being repugnant to the Constitution and Laws of the United States, and the decision is in favor of its validity, to the great damage of the said James W. Wuchter; we being willing that error, if any hath been, should be duly corrected and full and complete justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the 18th day of November, next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and Constitution of the United States should be done.

[fols. 42 & 43] Witness the Honorable William Howard Taft, Chief Justice of the said Supreme Court, the 3d day of November, in the year of our Lord One Thousand Nine Hundred and Twenty Six.

George T. Cramer, Clerk of the United States District Court for the District of New Jersey, by R. S. Chevrier, Deputy.

[fol. 44] In Court of Errors and Appeals of New Jersey

[Title omitted]

Assignments of Error

James W. Wuchter by James D. Carpenter, Jr., his attorney, comes and files the following assignments of error upon which he will rely, and says:

(1) That in the record and proceedings in the above cause there is manifest error in this, that by the record aforesaid it appears that the judgment in the New Jersey Court of Errors and Appeals was given in favor of the defendant-in-error and against the plaintiff-in-error, and that by the judgment of the said Court of Errors and Appeals the final judgment of the New Jersey Supreme Court in favor of the defendant-in-error and against the plaintiff-in-error was affirmed, whereby the jurisdiction of the New Jersey Supreme Court over the plaintiff-in-error was sustained notwithstanding the fact that process of summons and complaint issuing out of the New Jersey Supreme Court was attempted to be served upon the plaintiff-in-error, who was a resident and citizen of the City of Allentown, State of Pennsylvania, by serving the same upon the Secretary of State of the State of New Jersey, in pretended compliance with the provisions of an Act of the Legislature of the State of New Jersey entitled, "An Act providing for the service of process in the civil suits upon non-resident chauffeurs, operators, or non-resident owners whose motor vehicles are operated within the State of New Jersey, with-[fol. 45] out being licensed under the provisions of the Laws of the State of New Jersey, providing for the registration and licensing of drivers and operators and of motor vehicles, requiring the execution by them of a power of attorney to the Secretary of State of the State of New Jersey to accept civil process for them under certain conditions," and known as Chapter 232 of the Laws of 1924, which said statute of the State of New Jersey was unconstitutional and in violation of the Fourteenth Amendment of the Constitution of the United States, by reason whereof the said New Jersey Supreme Court was without jurisdiction to enter the final judgment complained of against the plaintiff-in-error.

(2) Because the New Jersey Court of Errors and Appeals did by a final judgment entered therein on October 18, 1926, affirm the judgment of the New Jersey Supreme Court entered February 19, 1926, and did decide in favor of the validity of the said statute of the State of New Jersey known as Chapter 232 of the Laws of 1924, and did decide that the said statute was not repugnant to the Constitution or Laws of the United States, and particularly Section 2 of Article IV and Section 1 of the Fourteenth Amendment.

(3) Because the New Jersey Court of Errors and Appeals erred in affirming the judgment entered in the New Jersey Supreme Court February 19, 1926, in favor of Michael Pizzutti, defendant-in-error, and against James W. Wuchter, plaintiff-in-error, whereas neither the New Jersey Supreme Court nor the New Jersey Court of Errors and Appeals had jurisdiction over the defendant-plaintiff-in-error because process was not served personally upon the plaintiff-in-error in the State of New Jersey and he did not [fol. 46] appear in said action.

(4) The New Jersey Supreme Court was without jurisdiction over the defendant plaintiff-in-error, because Chapter 232 of an Act of the Legislature of the State of New Jersey of 1924, under the terms of which the New Jersey Supreme Court claimed to have and exercised jurisdiction over the defendant-plaintiff-in-error, in an action in personam, was repugnant to the Fourteenth Amendment of the Constitution of the United States, Section 1, in that it deprives the plaintiff-in-error of liberty and property without due process of law and is therefore void.

(5) The New Jersey Supreme Court was without jurisdiction over the defendant-plaintiff-in-error, because Chapter 232 of an Act of the Legislature of the State of New Jersey of 1924, under the terms of which the New Jersey Supreme Court claimed to have and exercised jurisdiction over the defendant-plaintiff-in-error in this action, is repugnant to the Fourteenth Amendment of the Constitution of the United States, Section 1, in that it abridges the privileges and immunities of citizens of the several States and is therefore void.

(6) The New Jersey Supreme Court was without jurisdiction over the defendant plaintiff-in-error because Chapter 232 of an Act of the Legislature of the State of New Jersey of 1924, under the terms of which the New Jersey Supreme Court claimed to have and exercised jurisdiction over the defendant, is repugnant to the Fourteenth Amendment of the Constitution of the United States, Section 1, in that it denies to persons within the jurisdiction of the State of New Jersey equal protection of the laws and is [fols. 47 & 47½] therefore void.

(7) The New Jersey Supreme Court did not have jurisdiction over the defendant-plaintiff-in-error, a citizen of the State of Pennsylvania, because process was not served upon the defendant-plaintiff-in-error personally in the State of New Jersey, but service thereof was attempted to be acknowledged by the Secretary of State of the State of New Jersey, pretending to act in compliance with the provisions of Section 2 of Chapter 232 of an Act of the Legislature of the State of New Jersey of 1924, and that any such attempt of pretended service was void and repugnant to the Fourteenth Amendment of the Constitution of the United States and deprives the plaintiff-in-error of liberty and property without due process of law.

(8) The New Jersey Supreme Court and the New Jersey Court of Errors and Appeals were without jurisdiction over the defendant-plaintiff-in-error because Chapter 232 of an Act of the Legislature of the State of New Jersey of 1924, under the terms of which the New Jersey Supreme Court claimed to have and exercised jurisdiction over the defendant-plaintiff-in-error, was repugnant to Article IV, Section 2 of the Constitution of the United States, in that it deprives this defendant-plaintiff-in-error of all privileges and immunities of citizens in the several States and is therefore void.

James D. Carpenter, Jr., Attorney for Plaintiff-in-Error.

[fol. 48] Citation, in usual form, showing service on Jacob R. Mantel, filed November 9, 1926, omitted in printing.

[fol. 49] Return to writ of error omitted in printing.

[fol. 50] In Supreme Court of the United States

Statement of Points to be Relied Upon—Filed December 1, 1926

To the Clerk of the Supreme Court of the United States:

The plaintiff-in-error will rely upon all the errors assigned in his assignments of error heretofore filed, which points will be grouped under the following heads:

(1) The New Jersey Statute, under the terms of which process against plaintiff-in-error was attempted to be served, is repugnant to the Fourteenth Amendment of the Constitution of the United States, Section One, in that it deprives the plaintiff-in-error of property without due process of law and is therefore void, and the judgment under review must therefore be reversed.

(2) The New Jersey Statute, under the terms of which process against plaintiff-in-error was attempted to be served, is repugnant to the Fourteenth Amendment of the Constitution of the United States, Section One, in that it abridges the privileges and immunities of citizens of the United States and is therefore void, and the judgment under review must therefore be reversed.

(3) The New Jersey Supreme Court was without jurisdiction over the plaintiff-in-error because Chapter 232 of the Laws of New Jersey of 1924, under the terms of which the New Jersey Supreme Court claimed to have and exer-
[fol. 51] cised jurisdiction over the plaintiff-in-error, is repugnant to the Fourteenth Amendment of the Constitution of the United States, Section One, in that it denied to the plaintiff-in-error the equal protection of the laws and the judgment of the New Jersey Court of Errors and Appeals must therefore be reversed.

James D. Carpenter, Jr., Attorney for Plaintiff-in-Error.

[fols. 52 & 53] STATE OF NEW JERSEY,
County of Hudson, ss:

I, James D. Carpenter, Jr., of full age, being duly sworn, according to law, do hereby swear that I am counsel for the plaintiff in error in the above entitled cause; that I served a copy of the foregoing statement of points to be relied upon on the defendant in error by mailing on November 30, 1926, a copy thereof by United States Mail, postage prepaid, addressed to Jacob R. Mantel, Esq., Mantel Building, Summit, N. J., which is the usual place of business of said Jacob R. Mantel.

I do further swear that on November 11, 1926, I served on said Jacob R. Mantel, attorney for the defendant in error, a copy of the designation of the parts of the record to be printed, (the original of which designation I at the same time mailed to the Clerk of the Supreme Court) by mailing the same by United States Mail, postage prepaid, to Jacob R. Mantel, addressed to him Mantel Building, Summit, N. J., which is the correct and true address of the said Jacob R. Mantel.

James D. Carpenter, Jr.

Subscribed and sworn to before me this 30th day of November, 1926. Alice M. Boyle, Notary Public of New Jersey. (Seal of Alice M. Boyle, Notary Public New Jersey.)

[fol. 54] [File endorsement omitted.]

[fol. 55] IN SUPREME COURT OF THE UNITED STATES

DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed November 16, 1926

To William R. Stansbury, Esq., Clerk Supreme Court of the United States:

The plaintiff in error hereby designates the following parts of the record to be printed in the above entitled cause:

(1) The complete state of case entitled in the New Jersey Court of Errors and Appeals, which is attached to the Return.

(2) Opinion of the New Jersey Court of Errors and Appeals.

(3) Order of affirmance.

(4) Writ of Error.

(5) Assignments of Error.

(6) Citation and proof of service thereof.

(7) Certificate of Return of Secretary of State, State of New Jersey.

If it is usual to print the petition for writ of error that can be included, but we do not believe it is a necessary part of the record.

Respectfully yours, James D. Carpenter, Jr., Attorney for Plaintiff in Error.

[fol. 56] [File endorsement omitted.]

Endorsed on cover: File No. 32,286. New Jersey Court of Errors and Appeals. Term No. 729. James W. Wuchter, plaintiff in error, vs. Michael Pizzutti. Filed November 16th, 1926. File No. 32,286.

No. 142.

FILED
NOV 21 1927
CHARLES E. MOORE CROPLEY
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

JAMES W. WUCHTER,
Plaintiff-in-Error,

vs.

MICHAEL PIZZUTTI,
Defendant-in-Error.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

BRIEF FOR PLAINTIFF-IN-ERROR.

JAMES D CARPENTER, JR.,
Of Counsel.

Hebrew 248/289

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in that it deprived the defendant of property without due process of law; and in that the said statute of the State of New Jersey was repugnant to Article IV, Section 2 of the Constitution of the United States, in that it deprived the defendant, plaintiff-in-error, of the privileges and immunities of citizens in the several States, and is therefore void (see Grounds of Appeal, R., 10, 11).

The Court of Errors and Appeals in an opinion by Mr. Justice Katzenbach, filed October 18, 1926, held that Chapter 232 of the Laws of 1924 of the State of New Jersey, was not repugnant to Section 1 of the Fourteenth Amendment of the Federal Constitution or to Section 2, Article IV of the same document, and that the Supreme Court had jurisdiction over the defendant, and affirmed the said judgment (R., 12).

3. JURISDICTION.

The jurisdiction of this Court is invoked under the Act of Congress of February 13, 1925, 43 Statutes at Large 937, amending Section 237 of the Judicial Code; Code of General Laws, Title 28, Section 344, page 986; which provides, *inter alia*:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had . . . where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, statutes or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

Statement of the Case.

The case comes before the Court on a writ of error to the Court of Errors and Appeals of New Jersey, to review a judgment of that Court affirming a judgment of the New Jersey Supreme Court in favor of the defendant-in-error against the plaintiff-in-error for $856.47, including costs. The action was brought in the Supreme Court by Michael Pizzutti, a resident of Summit, New Jersey, against James W. Wuchter, a resident of Allentown, Pennsylvania, to recover damages for personal injuries and property damage sustained in an accident which happened September 17, 1925, on a highway in Essex County, New Jersey, when an automobile driven by Wuchter collided with a horse and wagon driven by Pizzutti.

The plaintiff below in bringing this action complied with the provisions of Chapter 232 of the Laws of 1924, which provides, *inter alia*:

> "1. From and after the passage of this act any chauffeur, operator or owner of any motor vehicle, not licensed under the laws of the State of New Jersey, providing for the registration and licensing of motor vehicles, who shall accept the privilege extended to nonresident chauffeurs, operators and owners by law of driving such a motor vehicle or of having the same driven or operated in the State of New Jersey, without a New Jersey registration or license, shall, by such acceptance and the operation of such automobile within the State of New Jersey, make and constitute the Secretary of State of the State of New Jersey, his, her or their agent for the acceptance of process in any civil suit or proceeding

by any resident of the State of New Jersey against such chauffeur, operator or the owner of such motor vehicle, arising out of or by reason of any accident or collision occuring within the State in which a motor vehicle operated by such chauffeur, or operator, or such motor vehicle is involved."

The Sheriff's Return shows that he:

"Served within Summons and Complaint November 19th, A. D. 1926, upon James W. Wuchter, Deft., by leaving a copy of the same in the office of the Secretary of State, N. J., with Ernest R. Kerr, Chief Clerk in said Office (the Secretary of State being absent from his office), with a service fee of Two Dollars.

CHARLES H. REICHERT, Sheriff."

(R. 3).

On January 6, 1926, defendant having not appeared and no answer having been filed, judgment interlocutory by default was entered against him (R. 3).

On January 16, 1926, there was served on Mr. Wuchter personally at Allentown, Pennsylvania, notice that a writ of inquiry of damages would be executed on January 27th, at the Court House, Elizabeth, N. J. (R. 4). The damages were assessed before a Sheriff's jury on said writ of inquiry on January 27, 1926, and the jury returned a verdict for plaintiff against the defendant for $770.25 damages.

On February 9, 1926, there was served on Mr. Wuchter personally at Allentown, Pennsylvania, a notice that on Saturday, February 13, 1926, plaintiff would apply to a New Jersey Supreme Court Justice, at his chambers in Newark, for an order to enter final judgment on the writ of inquiry (R. 7). On February 13, 1926, Justice Kalisch of

the Supreme Court signed an order for the entry of judgment on the return of the writ of inquiry (R. 8), and final judgment was actually entered February 19, 1926, for $770.25 damages, and $86.22 costs (R. 9).

No appearance of any kind was entered for the defendant and nothing was done by him until after the entry of final judgment, when he took his appeal to the Court of Errors and Appeals.

The notice of appeal served by plaintiff in error specified, as permitted by the New Jersey practice, the grounds of appeal, and those grounds of appeal raised the precise Federal questions which are raised here.

The order affirming the judgment of the New Jersey Supreme Court was filed in the New Jersey Court of Errors and Appeals October 27, 1926 (R. 19). The writ of error was allowed by Chancellor Walker, as President Judge of the Court of Errors and Appeals, November 3, 1926 (R. 19).

Specifications of Error.

(1) The learned Court below erred in affirming the judgment of the New Jersey Supreme Court against plaintiff in error, and in holding that service of process in an action in the New Jersey Courts could be served upon the plaintiff in error, a resident of Allentown, Pennsylvania, by serving the same upon the Secretary of State of New Jersey under the provisions of Chapter 232, Laws of 1924 of New Jersey, whereas said statute was invalid and in contravention of the Constitution of the United States and particularly Section 1 of Article XIV of Amendments thereto.

(2) Because the New Jersey Court of Errors and Appeals did by a final judgment entered October 18, 1926, affirm the judgment of the New Jersey Supreme Court entered February 19, 1926, and did decide that Chapter 232 of the Laws of 1924 was not repugnant to Article IV, Section 2 of the Constitution of the United States, and that it did not deprive plaintiff-in-error of the privileges and immunities of citizens in the several States.

ARGUMENT.

POINT I.

This case is not controlled by the decision in Hess vs. Pawloski, 274 U. S. 352, for the reason that the New Jersey Statute does not require process to be forwarded to the non-resident and postponing of judgment awaiting an appearance.

The New Jersey Statute differs in certain vital respects from the Massachusetts Statute that was upheld by this Court in *Hess* vs. *Pawloski*, 274 U. S. 352.

The New Jersey Statute, Chapter 232, P. L. 1924, provides that the non-resident automobilist by accepting the privilege extended to non-resident chauffeurs, operators and owners by law of driving a motor vehicle in the State of New Jersey, "shall, by such acceptance and the operation of such automobile within the State of New Jersey, make and constitute the Secretary of State of the State of New Jersey, his, her or their agent for the acceptance of process in any civil suit or proceeding by any resident

of the State of New Jersey against such chauffeur, operator or the owner of such motor vehicle, arising out of or by reason of any accident or collision occurring within the State in which a motor vehicle operated by such chauffeur, or operator, or such motor vehicle is involved."

The statute contains no provisions, such as those mentioned in Mr. Justice Butler's opinion in *Hess* vs. *Pawloski*, *supra*, for sending notice of such service and a copy of the process forthwith by registered mail by the plaintiff to the defendant, and the defendant's return receipt, and plaintiff's affidavit of compliance with them, nor is there any provision in the New Jersey Statute "for such continuance as may be necessary to afford the defendant reasonable opportunity to defend the action", which is a highly important provision of the Massachusetts Statute.

The New Jersey Practice Act, as amended by P. L. 1912, Chapter 264, page 469, provides:

> "The first process in personal actions in cases where the plaintiff is not entitled to bail shall be a summons, a copy whereof shall be served on the defendant in person, or left at his usual place of abode. Said service shall be made forthwith after the process is delivered to the sheriff or other officer for service. If the defendant be a corporation, the summons shall be served as provided in the act entitled 'An act concerning corporations (Revision of 1896),' except that the service shall be made in such case forthwith after delivery of the summons to the sheriff. If the defendant be the board of chosen freeholders of any county or municipal corporation, or a township, the summons shall be served on the clerk or presiding officer of said board, or on the clerk of the municipality or township, or on the mayor or presiding officer of the governing body

> forthwith after it is delivered to the sheriff or other officer for service. And when the sheriff or other officer shall return the same 'served', the party shall be considered as in court, and be proceeded against accordingly; provided, if the defendant be the board of chosen freeholders of a county or a municipal corporation or a township, the sheriff or other officer shall in his return state on whom the summons was served." *Comp. Stat. Supp.*, Vol. 2, p. 2798.

The fact that notice of plaintiff's intention to assess damages on writ of inquiry before a sheriff's jury was served on the defendant personally in Pennsylvania, could not cure the failure to serve the summons and complaint upon him personally within the territorial limits of New Jersey.

Judgment interlocutory was entered by default against the defendant before any notice was served upon him, other than the statutory service upon the Secretary of State.

It is respectfully submitted that the New Jersey Statute is therefore void as repugnant to the Fourteenth Amendment, Section 1.

Pennoyer vs. *Neff*, 95 U. S., 714;
Goldey vs. *Morning News*, 156 U. S., 518;
McDonald vs. *Mabee*, 243 U. S., 90;
Flexner vs. *Farson*, 249 U. S., 289;
Pennsylvania Fire Insurance Co. vs. *Gold Issue Mining Co.*, 243 U. S., 93, 96.

POINT II.

The New Jersey Statute is repugnant to Article IV, Section 2 of the Constitution, in that none but residents may bring suits under it, and none but non-residents of New Jersey may be sued.

The title of Chapter 232, P. L. 1924 of New Jersey, expressly states that it is an act providing for the service of process in civil suits upon non-resident chauffeurs, operators or non-resident owners whose motor vehicles are operated within the State of New Jersey without being licensed.

Section 1 provides that such persons shall by the acceptance and operation of such automobile within the State of New Jersey make and constitute the Secretary of State his or her agent "for the acceptance of process in any civil suit or proceeding *by any resident of the State of New Jersey* against such chauffeur, operator or the owner of such motor vehicle, arising out of or by reason of any accident or collision occurring within the State in which a motor vehicle operated by such chauffeur, or operator, or such motor vehicle is involved".

Section 4 of the statute provides:

> "This act shall be construed to extend the right of service of process upon non-residents and shall not be construed as limiting any provision for the service of process now or hereafter existing."

Under this statute service of process can be made only upon non residents at the suit of residents of the State of New Jersey.

The Massachusetts Statute, which was construed in *Hess* vs. *Pawloski*, provided that "all lawful processes in any action or proceeding" against the non-resident, growing out of any accident or collision in which the non-resident might be involved while operating a motor vehicle in Massachusetts, might be served on the registrar.

Therefore, should there be an automobile accident in New Jersey, in which an automobile from another State should injure several persons, the residents of New Jersey would be permitted to sue the non-residents in the Courts of New Jersey by serving process upon the Secretary of State. If one of the persons injured were a non-resident, he could not bring his suit in New Jersey and have it tried with the resident's action, unless, possibly, he engaged the same attorney and joined his action with the resident's action. The non-resident plaintiff would have no right to start an independent action of his own in New Jersey against the non-resident unless he could effect personal service upon him, because the statute in question limits its benefits to residents.

> "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by such state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution. Corfield v. Coryell, 4 Wash. C. C. 371, 380, Fed. Cas. No. 3,230, per Washington, J.; Ward v. Maryland, 12 Wall. 418, 430, 20 L. ed.

449, 452, per Clifford, J.; Cole *v.* Cunningham, 133 U. S. 107, 114, 33 L. ed. 538, 542, 10 Sup. Ct. Rep. 269, per Fuller, Ch. J.; Blake *vs.* McClung, 172 U. S. 239, 252, 43 L. ed. 432, 437, 19 Sup. Ct. Rep., 165, per Harlan, J.

"But, subject to the restrictions of the Federal Constitution, the state may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The state policy decides whether and to what extent the state will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. Different states may have different policies, and the same state may have different policies at different times. But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is void, because in conflict with the supreme law of the land."

Mr. Justice Moody in *Chambers* vs. *Baltimore & Ohio R. Co.*, 207 U. S., 142; 52 L. ed. 146.

In *Cole* vs. *Cunningham*, 133 U. S., 107, 114, Chief Justice Fuller, speaking for the Court said:

"The intention of Section 2 of Article 4 was to confer on the citizens of the several states a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under the like circumstances, and this includes the right to institute actions."

In *Paul* vs. *Virginia*, 8 Wall., 168, 180, the Court speaking by Mr. Justice Field said:

> "It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states; it inhibits discriminating legislation against them by other states; it gives them the right of free ingress into other states, and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws."

The title of the act under consideration shows that it was directed solely against non resident chauffeurs, operators and non-resident owners whose motor vehicles are operated within the State of New Jersey. Should a resident of New Jersey abscond from or move from this State, after having an automobile accident, service of process could not be made upon him under this statute, but the plaintiff, whether resident or non resident, would be obliged to follow him and effect service where he could be found. A non-resident, however, is served under the provisions of this statute with ease, provided the suit is brought by a resident.

It would seem that where a statute is thus aimed solely at non residents, for the benefit of residents alone, and non-residents are denied all of its benefits in case they have the same grievances as residents, the statute is void.

Blake vs. *McClung*, 172 U. S. 239; 176 U. S. 59;
Sully vs. *American National Bank*, 178 U. S. 289;

Southern Railway Co. vs. *Greene*, 216 U. S. 400;
Herndon vs. *Chicago, R. I. & P. R. Co.*, 218 U. S. 135;
Roach vs. *Atchison, T. & S. F. R. Co.*, 218 U. S. 159.

It is respectfully submitted therefore the judgment under review must be reversed for the reason that Chapter 232 of the Laws of 1924 of the State of New Jersey is repugnant to Section 1 of the Fourteenth Amendment, and is also repugnant to Section 2 of Article IV, for the reasons hereinabove stated.

CONCLUSION.

It is respectfully submitted that the judgment under review must be reversed.

JAMES D. CARPENTER, JR.,
Of Counsel with Plaintiff in Error.

APPENDIX.

CHAPTER 232, LAWS OF 1924.

An Act providing for the service of process in the civil suits upon nonresident chauffeurs, operators, or nonresident owners whose motor vehicles are operated within the State of New Jersey, without being licensed under the provisions of the Laws of the State of New Jersey, providing for the registration and licensing of drivers and operators and of motor vehicles, requiring the execution by them of a power of attorney to the Secretary of State of the State of New Jersey to accept civil process for them under certain conditions.

BE IT ENACTED BY THE SENATE AND GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY:

1. From and after the passage of this act any chauffeur, operator or owner of any motor vehicle, not licensed under the laws of the State of New Jersey, providing for the registration and licensing of motor vehicles, who shall accept the privilege extended to nonresident chauffeurs, operators and owners by law of driving such a motor vehicle or of having the same driven or operated in the State of New Jersey, without a New Jersey registration or license, shall by such acceptance and the operation of such automobile within the State of New Jersey, make and constitute the Secretary of State of the State of New Jersey, his, her or their agent for the acceptance of process in any civil suit or proceeding by any resident of the State of New Jersey against such chauffeur, operator or the owner of such motor vehicle, arising out of or by reason of any accident or col-

lision occurring within the State in which a motor vehicle operated by such chauffeur, or operator, or such motor vehicle is involved.

2. Whenever any collision or accident shall occur within the State of New Jersey and the driver of any motor vehicle involved therein shall be a nonresident and shall not be licensed under the laws of the State of New Jersey to operate a motor vehicle, or, a motor vehicle involved in any such collision or accident shall not be registered or licensed under the laws of the State of New Jersey, the magistrate before whom the nonresident owner of such motor vehicle or such operator shall be brought shall require such nonresident, as a condition to his release on bail or otherwise, to execute a written power of attorney to the Secretary of State of the State of New Jersey appointing such officer the lawful agent of such nonresident for the acceptance of service of process in any civil suit instituted or to be instituted by any resident of the State of New Jersey against such nonresident for or on account of any claim, demand or cause of action arising out of such collision or accident.

Such power of attorney shall be upon a form prepared and furnished to such recorder or other committing magistrate by the Secretary of State, and shall, after execution, be filed with the Secretary of State; and the requirements of this section shall be in addition to and not in limitation of any other provision concerning the giving of bail or other security.

3. From and after the passage of this act it shall and may be lawful to serve civil process upon a nonresident owner of a motor vehicle in any action or proceeding arising out of a collision or accident in which any automobile of such nonresident, which automobile was not registered or licensed in the State of New Jersey under the provi-

sions of the laws providing for such registration and license, upon any chauffeur, or operator of that or any other motor vehicle of such nonresident owner while such motor vehicle is by such chauffeur or operator being operated within the State of New Jersey. Service of process in any such action arising in such manner may be also lawfully served hereafter upon any nonresident owner by serving such process upon any person over the age of fourteen years who has the custody of such automobile, whether held by him as security or driven; provided, however, that a copy of such civil process also be posted in a conspicuous place upon such automobile.

4. This act shall be construed to extend the right of service of process upon nonresidents and shall not be construed as limiting any provision for the service of process now or hereafter existing.

5. This act shall take effect immediately.

Approved March 12, 1924.

FILED
JAN 11 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 142, October Term, 1927.

James W. Wuchter,
Plaintiff-in-Error,
v.
Michael Pizzutti,
Defendant-in-Error.

In Error to the Court of Errors and Appeals of New Jersey.

Memorandum of Information Requested by Members of the Court at the Time of the Argument.

In accordance with the request of members of the Court made during the argument of the above entitled cause, I beg to submit the following authorities.

(1) Re opening of judgment.

I cannot find any statutory provision in New Jersey for opening a judgment after a lapse of time. We have no more than the common law powers of a Court to control its own judgments.

(2) Re forwarding of process to foreign corporations served under the corporation and insurance statutes.

Section 99 of the New Jersey Corporation Act (2 Comp. Stat., p. 1658), provides that if the agent of a foreign

corporation dies, removes from the State or becomes disqualified, etc., the corporation shall forthwith file in the office of the Secretary of State a written appointment of another agent, and in case of omission to do so, then the Secretary of State shall revoke the certificate of authority, and process against such corporation in actions upon any liability incurred within this State before the designation of another agent may, after such revocation, be served upon the Secretary of State; at the time of such service the plaintiff shall pay to the Secretary of State two dollars, "and the Secretary of State shall forthwith mail a copy of such process to such corporation at its general office or to the address of some officer thereof, if known to him."

The New Jersey Insurance Company Act provides in Section 61 (Comp. Stat., Vol. 2, p. 2857), that when any original process against a foreign corporation is served upon the commissioner of banking and insurance as attorney for an insurance company, "he shall forthwith notify the company of such service by letter directed to its secretary, or in the case of a company of a foreign country to its resident manager, if any, in the United States; and shall within two days after such service forward in the same manner a copy of the process served on him to such secretary or manager, or to such other person as may have been previously designated by the company by written notice filed in the department of banking and insurance; said commissioner shall keep a record of all such process, which shall show the day and hour of service."

(3) Re right to review a judgment on writ of error for want of jurisdiction when no appearance was entered before the judgment.

The New Jersey cases holding that a case may be brought on writ of error to the Court of Last Resort, although there was no appearance until after final judgment, are as follows:

Barrett Mfg. Co. v. *Kitchell*, 84 N. J. L. 326;
Stehr v. *Ollbermann*, 49 N. J. L. 633;
Jaudel v. *Schoelzke*, 95 N. J. L. 171.

The basis of these decisions is that legal error appearing in the record of a judgment is reviewable on error, even though the lower court might and should, on application, have rectified the error.

In *Stehr* v. *Ollbermann*, the question was jurisdictional, and the Court of Errors and Appeals dealt with it on error.

The New Jersey Practice Act of 1912 (P. L. 1912, p. 377, Section 25) provides:

> "Bills of exceptions and writs of error in civil cases are abolished. In lieu of a writ of error, an appeal may be taken in any case in which the appellant would, heretofore, have been entitled to that writ."

Respectfully submitted,

JAMES D. CARPENTER, JR.,
Of Counsel with Plaintiff-in-Error.

Office Supreme Court, U. S.
NOV 28 1927
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 142.

JAMES W. WUCHTER,

Plaintiff-in-Error,

—against—

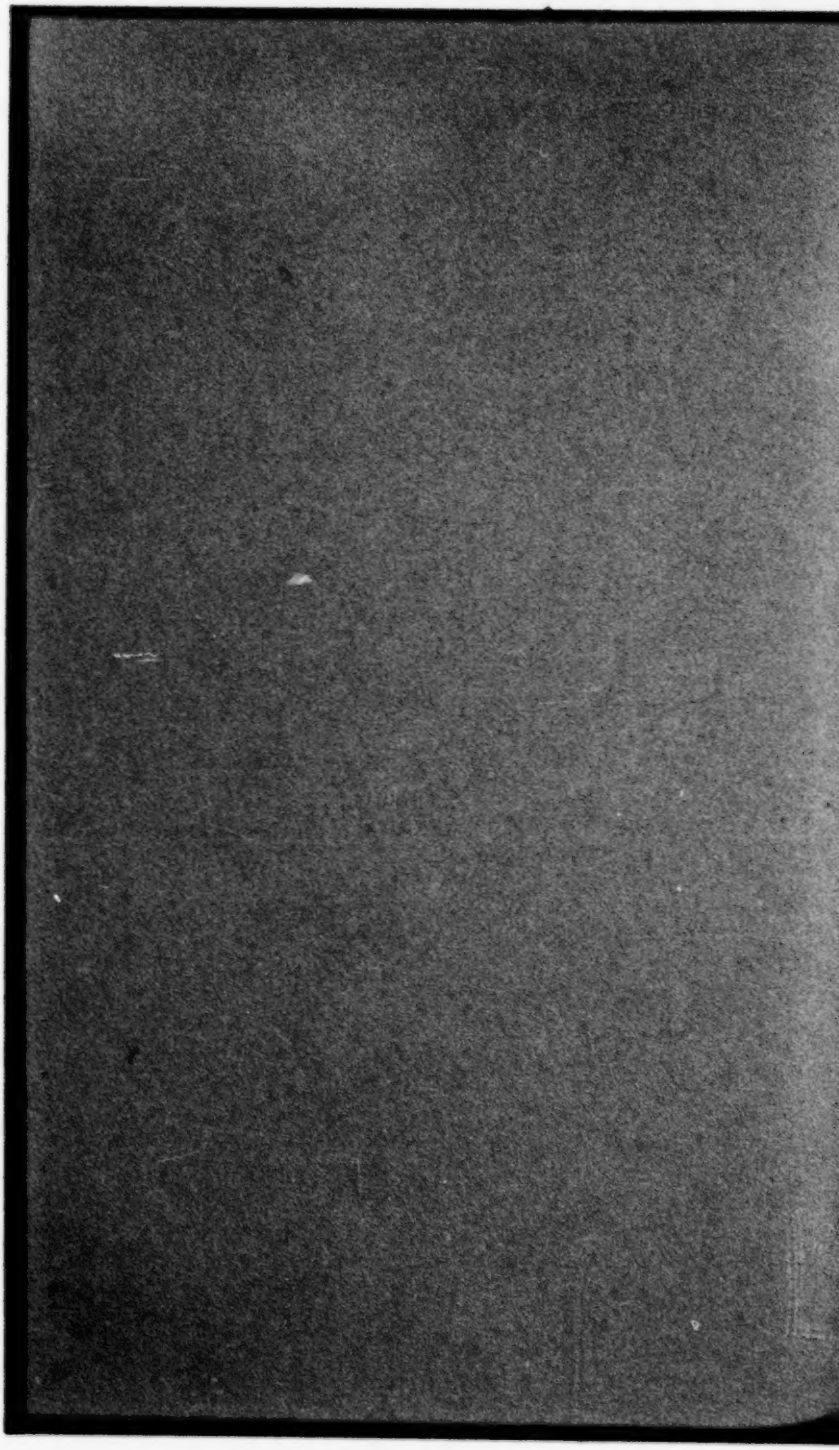
MICHAEL PIZZUTTI,

Defendant-in-Error.

NOTICE OF MOTION FOR DIMINUTION OF THE RECORD, AFFIDAVITS AND BRIEF IN SUPPORT THEREOF.

JACOB R. MANTEL,
Attorney for Defendant-in-Error.

Arthur W. Green, Law Printer, 69-61 Lafayette Street, Newark, N. J.



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IN THE

Supreme Court of the United States

No. 142—October Term, 1927.

James W. Wuchter,

Plaintiff-in-Error,

—against—

Michael Pizzutti,

Defendant-in-Error.

NOTICE OF MOTION FOR DIMINUTION OF THE RECORD.

To Charles Elmore Crockley, Clerk, and James D. Carpenter, Jr., Esq., attorney for plaintiff-in-error.

Sirs:

Take Notice of a motion before the Supreme Court of the United States, Washington, D. C., at the time argument is heard on the writ of error in the above cause, for an order to include in the record of this cause, affidavits hereunto attached and made part hereof.

Dated: November 21, 1927.

Respectfully yours,

JACOB R. MANTEL,
Attorney for Defendant-in-Error.

IN THE

Supreme Court of the United States

Affidavit of the Chief Clerk in the Office of the Secretary of State of the State of New Jersey.

STATE OF NEW JERSEY, } ss.
COUNTY OF UNION.

ERNEST R. KERR, of full age, being duly sworn according to law, on his oath deposes and says:

I am Chief Clerk in the office of the Secretary of State of the State of New Jersey. On the 19th day of November, 1925, the summons and complaint issued out of the New Jersey Supreme Court, in the above-entitled matter, addressed to Mr. James W. Wuchter, at #103 South Madison street, Allentown, Pennsylvania, was mailed to the defendant, with postage prepaid thereon. That there has been no return to the summons nor has the same been returned to the office of the Secretary of State of the State of New Jersey, by the Post Office authorities.

ERNEST R. KERR.

Sworn and subscribed to before me this
19th day of November, A. D. 1927.

FRANK LANSU,
M. C. C. of N. J.

Affidavit of Jacob R. Mantel.

STATE OF NEW JERSEY,
COUNTY OF UNION. } *ss.*

JACOB R. MANTEL, of full age, being duly sworn according to law, on his oath deposes and says:

I am the attorney of record for the defendant-in-error herein. Before the institution of this suit in the New Jersey Supreme Court, the defendant-in-error herein handed to me the name and address of the plaintiff-in-error, which, as he informed me, he had obtained from the plaintiff-in-error. The name and address given to me was as follows:

James W. Wuchter, #103 South Madison street, Allentown, Pennsylvania.

JACOB R. MANTEL.

Sworn and subscribed to before me this
22nd day of November, A. D. 1927.

J. JEROME KAPLOW,
An Attorney at Law of N. J.

IN THE

Supreme Court of the United States

No. 142—October Term, 1927.

James W. Wuchter,
Plaintiff-in-Error,

—against—

Michael Pizzutti,
Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR IN SUPPORT OF MOTION FOR DIMINUTION OF RECORD.

Defendant-in-error desires to have the affidavits hereinbefore set forth included in the record of this case. These affidavits were not put in the record or called for before this, because the plaintiff-in-error did not raise the point as set forth in Point I of his brief (brief of plaintiff-in-error, page 6). He did not raise this point in the statement of points to be relied upon (R. 24), and as this is the first time this point is raised, the real facts should be brought before the attention of this Court, to wit, that the process in this case was mailed by the Secretary of State of the State of New Jersey to the plaintiff-in-error giving him notice of the institution of the suit. The counsel for the plaintiff-in-error has informed me that he would agree to have stated to the Court, that the process was mailed to the plaintiff-in-error and received by him, but that he would not consent in writing to have the affidavits herein included in this record.

Defendant-in-error therefore moves that the affidavits herein of Jacob R. Mantel and Ernest R. Kerr be included as part of the record of this cause in this Court.

Respectfully submitted,

JACOB R. MANTEL,
Attorney for Defendant-in-Error.

FILED
NOV 29 1927
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 142.

JAMES W. WUCHTER,

Plaintiff-in-Error,

vs.

MICHAEL PIZZUTTI,

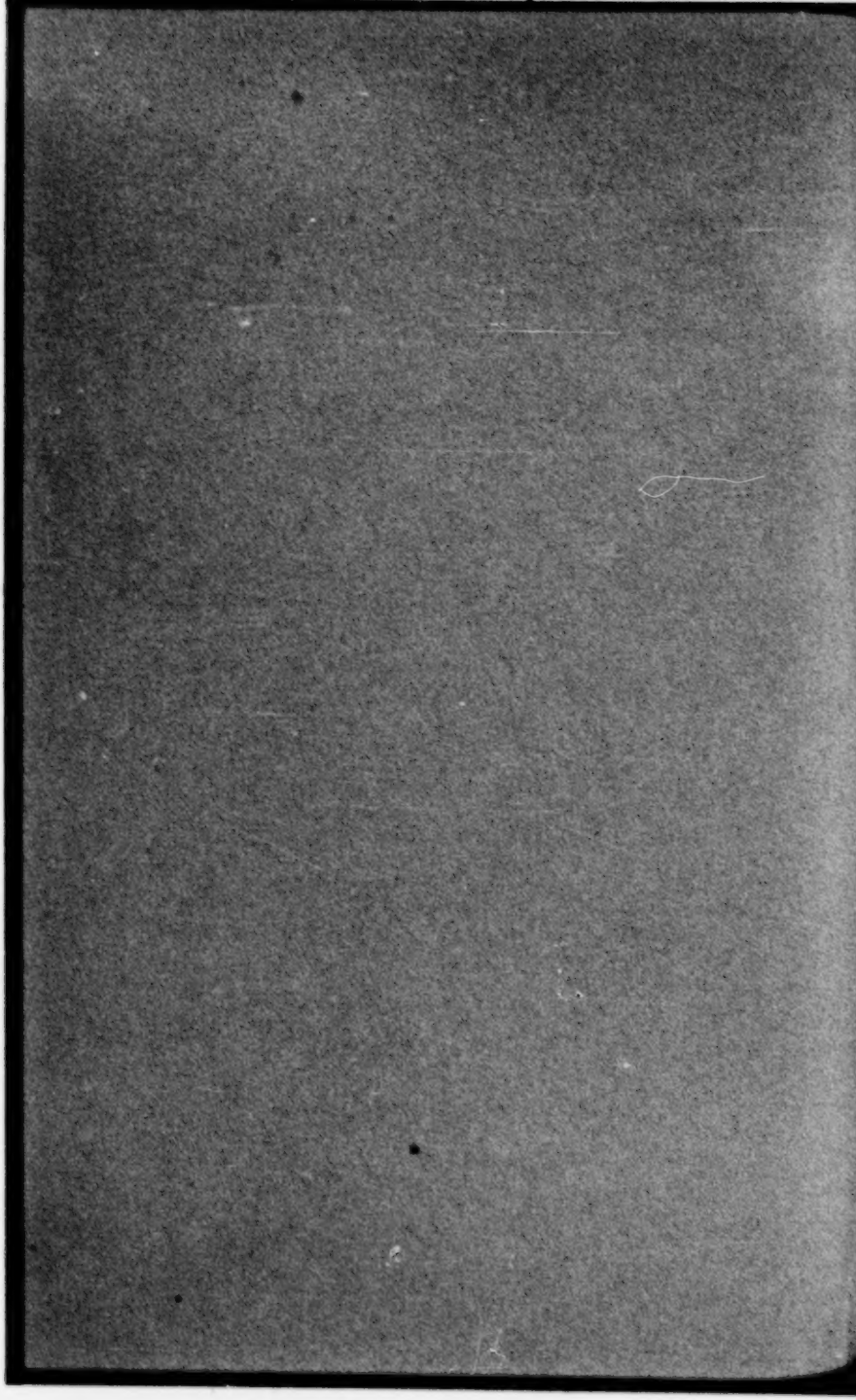
Defendant-in-Error.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

BRIEF FOR DEFENDANT-IN-ERROR.

JACOB R. MANTEL,
Counsel for Defendant-in-Error.

Arthur W. Cross, Law Printer, 32-34 Lafayette Street, Newark, N. J.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 142.

JAMES W. WUCHTER,

Plaintiff-in-Error,

vs.

MICHAEL PIZZUTTI,

Defendant-in-Error.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

BRIEF FOR DEFENDANT-IN ERROR.

PREVIOUS OPINION IN THE PRESENT CASE.

The opinion of the New Jersey Court of Errors and Appeals in this case which was taken on a writ of error is not yet officially reported. The opinion, however, is reported in 134 Atlantic Reports 727, and printed in full (R. 12-18).

GROUNDS OF JURISDICTION.

This writ of error relates to a judgment entered in the New Jersey Court of Errors and Appeals on October 27, 1926 (R. 19).

The specific claims advanced and rulings made in t
lower court, which are relied upon as the basis of th
Court's jurisdiction, are set forth in the assignment
errors (R. 20-23) and the statement of points to be reli
upon (R. 24).

The jurisdiction of this Court is invoked and base
upon section 237 of the Judicial Code, Code of Gener
Laws, title 28, section 344, page 906.

STATEMENT OF THE CASE.

This was an action in tort brought by Michael Pizzut
a resident of Summit, in the State of New Jersey, again
James W. Wuchter, a resident of Allentown, in the Sta
of Pennsylvania, to recover compensation for person
injuries and property damage which the said Pizzut
sustained in an accident which occurred on September 1
1925, on a public highway in Essex County, New Jerse
when a motor vehicle driven by the said Wuchter collide
with a horse and wagon driven by the said Pizzutti.

Service was made upon the defendant by delivery
the summons and complaint by the Sheriff upon the Secr
tary of State (R. 3), and the Secretary of State, in turn
on November 19, 1925, mailed said summons and com
plaint to the address of Wuchter at #103 South Madiso
street, Allentown, Pennsylvania, and no return of th
summons and complaint was made to the Secretary
State, or were the papers returned to his office by the Po
Office authorities. The affidavit of mailing by the Secr
tary of State, and the affidavit of Jacob R. Mantel, a
torney of the said Pizzutti, were not included in th
record of the case, but it is now presented to this Cour
to be included in the record of this case by a motion pr
sented at this argument, and liberty is now taken to in
form the Court that the plaintiff-in-error has agreed tha
the summons and complaint in this case was mailed to th

defendant at his address, #103 South Madison street, Allentown, Pennsylvania, on November 19, 1925, and received by plaintiff-in-error and that no steps were taken by him upon receipt of the said summons and complaint. Defendant-in-error, in proceeding with the process in bringing this suit, complied with Chapter 232 of the Laws of 1924, of New Jersey, pertinent parts of which are:

> "1—From and after the passage of this act any chauffeur, operator or owner of any motor vehicle, not licensed under the laws of the State of New Jersey, providing for the registration and licensing of motor vehicles, who shall accept the privilege extended to non-resident chauffeurs, operators and owners by law of driving such a motor vehicle or of having the same driven or operated in the State of New Jersey, without a New Jersey registration or license, shall, by such acceptance and the operation of such automobile within the State of New Jersey, make and constitute the Secretary of State of the State of New Jersey, his, her or their agent for the acceptance of process in any civil suit or proceeding by any resident of the State of New Jersey against such chauffeur, operator or the owner of such motor vehicle, arising out of or by reason of any accident or collision occurring within the State in which a motor vehicle operated by such chauffeur, or operator, or such motor vehicle is involved.
>
> 4. This act shall be construed to extend the right of service of process upon non-residents and shall not be construed as limiting any provision for the service of process now or hereafter existing."

On January 6, 1926, the defendant, not having appeared or made any reply to said summons and complaint served upon him, interlocutory judgment by default was entered against him (R. 3).

On January 16, 1926, Mr. Wuchter was personally served at Allentown, Pennsylvania, with notice that a writ of inquiry of damages would be executed on the 27th day of January, 1926, at the Court House, Elizabeth, New Jersey (R. 4).

The damages were thereafter assessed by a sheriff's jury and another notice was served upon Mr. Wuchter, personally, at Allentown, Pennsylvania, that application would be made for entry of final judgment (R. 7), on the 13th day of February, 1927, and on that day judgment was entered for $770.25 and $86.22 costs, making a total of $856.47 (R. 9). Defendant, Wuchter, made no appearance whatsoever, and on the 8th day of March, 1926, the defendant, Wuchter, took an appeal to the Court of Errors and Appeals of the State of New Jersey (R. 9).

The judgment of the New Jersey Supreme Court was affirmed in the New Jersey Court of Errors and Appeals on October 27, 1926 (R. 19) and a writ of error was thereupon allowed on November 3, 1926 (R. 19).

ARGUMENT.

POINT I.

This case is controlled by the decision in Hess vs. Pawloski.

The point herein raised by the plaintiff-in-error is not set forth in the grounds of appeal (R. 10-11); assignment of errors (R. 20-23) and the statement of points to be relied upon (R. 24).

This writ of error was allowed before the decision in the case of Hess vs. Pawloski. As heretofore stated, it is admitted that the Secretary of State of the State of New Jersey did mail the summons and complaint to the defendant and the same was received by the defendant. Failure to include the same in part of the record was be-

cause the defendant did not raise the question on his appeal from the New Jersey Supreme Court to the Court of Errors and Appeals and application is now made to this Court to include the same in this record.

This point was not raised in the New Jersey Court of Errors and Appeals and, it is respectfully submitted, cannot be raised in this Court, because the same does not come within the purview of the statement of points to be relied upon (R. 24).

It is, however, contended that the New Jersey Court of Errors and Appeals committed no error in affirming the decision of the New Jersey Supreme Court. The case of Hess *vs.* Pawloski is depositive of this case and the question is, whether the New Jersey statute is a reasonable use of the police power. It does not deprive the plaintiff-in-error of his property without due process of law.

> Hess *vs.* Pawloski, 274 U. S. 352 (1927);
> State *vs.* Belden (Wisconsin), 211 N. W. 916 (1927).

The State can, by barring non-residents from using its highways with motor vehicles, subject violators to regulations and be penalized.

> Kane *vs.* New Jersey, 242 U. S. 160 (1916).

There is no question but that the State may forbid a non-resident to do certain acts within the State involving the danger to life and property unless he first consents to the exercise of the jurisdiction of the courts of the State as to causes of action out of these acts.

> Hess *vs.* Pawloski, 274 U. S. 352 (1927);
> Kane *vs.* New Jersey, 242 U. S. 160 (1916);
> Pawloski *vs.* Hess, 250 Mass. 22-29 (1925);

State *vs.* Belden (Wisconsin), 211 N. W. 916 (1927).

All persons are presumed to know the law and when a non-resident enters the State of New Jersey and proposes to use the highways for motoring, he does, by virtue of this Statute, submit himself to the jurisdiction of the courts of the State of New Jersey, and subjects himself to regulation enacted in the interest of public safety as to the use of his automobile while in the foreign State.

Hendrick *vs.* Maryland, 235 U. S. 610 (1914);
Kane *vs.* New Jersey, 242 U. S. 160 (1916);
Packard *vs.* Banton, 264 U. S. 140 (1923).

Justice Butler in Hess vs. Pawloski said:

> "The difference between the formal and implied appointment is not substantial so far as concerns the application of the due process clause of the Fourteenth Amendment."

The vital question raised by the plaintiff-in-error in Point I is whether the New Jersey Statute has afforded fully opportunity for a hearing and defense to defendant. This question is answered in the affirmative in the case of Missouri *vs.* North, 271 U. S. 40-41 (1926), wherein Mr. Justice Stone says:

> "It has been so often pointed out in the opinions of this Court that the Fourteenth Amendment is concerned with the substance and not with the forms of procedure to make unnecessary any extended discussion of the question here presented. The due process clause does not guarantee to a citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard and to present his claim or

> defense; due regard being had to the nature of the proceedings and the character of the rights which may be affected by it."

In passing this point, it is well to understand that plaintiff-in-error was informed of a pending cause of action in which he was involved. Such information was conveyed to him by virtue of personal service upon him in the State of Pennsylvania, informing him of the various orders of the Court before and after they were entered.

The form of service in this cause has given the non-resident motorist full notice and ample opportunity for defense. Preserving these rights, the State is wholly within its power in providing methods of procedure.

> "As the law is that the process shall be served upon the public officer * * * we cannot take upon ourselves to say that the law is so contrary to natural justice as to render the judgment void in a case where the process was so served."
>
> Becquet *vs.* McCarthy, 2 B. & Ad. 951 at 959 (1831).

After all, what has the plaintiff-in-error to complain of, when we amass the many opportunities afforded him to step in and defend the action, viz:

> (1) When the summons and complaint were first served upon him by the Secretary of State by mail.
>
> (2) Notice that a writ of inquiry of damages would be executed, personally served upon the plaintiff-in-error, at his residence in Allentown, Pennsylvania (see affidavit of John H. Diefenderfer (R. 4).
>
> (3) Notice of motion for final judgment, personally served upon the plaintiff-in-error at his residence in Allentown, Pennsylvania (see affidavit of John H. Diefenderfer (R. 8).)

He did nothing until judgment final was entered, then he appeared.

In the case of City of Chicago *vs.* Sturges, 222 U. S. 313, 56 L. Ed. 215, an Illinois statute provided for indemnifying the owners of property for damages occasioned by mobs and riots by compelling the city to pay over three-fourths of the damage resulting. It was argued that such a statute denies to the city due process of law. The Court said:

> "The law provides for a judicial hearing. If such legislation be reasonably adapted for the end in view, afford a hearing before judgment and is not forbidden by some other affirmative provision of constitutional law it is not to be regarded as denying due process of law under provisions of the 14th Amendment."

In New Jersey, in actions in tort, as was the situation here, it is required that before the plaintiff executes his writ of inquiry that a notice be served upon the defendant and also, as in this case, the damages being assessed by writ of inquiry, no judgment thereon can be entered without notice thereof being given to the defendant. The pertinent statute in question is to be found in 3 New Jersey Compiled Statutes, pages 4096-4097, sections 138-139, New Jersey Public Laws, 1903, page 575, as follows:

> "Sec. 138—Notice of writs of inquiry.—The same notice shall be given of executing writs of inquiry and of countermand as is required for the trial of issues of fact; if the plaintiff shall not execute the writ of inquiry according to notice or countermand such notice in due time, the defendant shall be entitled to costs (P. L. 1903, p. 575).

Sec. 139—Final judgment; entry.—If the damages are assessed by a writ of inquiry, no rule for final judgment shall be entered, except by order of the Court or a judge on notice to the defendant; but if the damages are assessed by the Court or a judge or the clerk, a rule for final judgment may be entered upon filing such assessment as of course, which judgment shall be signed and take effect as of the day when such rule is actually entered (P. L. 1903, p. 575)."

It will therefore be observed that the plaintiff-in-error was given reasonable notice of this action by the service upon him of the notice of the writ of inquiry (R. 4) and notice of motion for final judgment (R. 7).

POINT II.

The New Jersey Statute is not repugnant to Article IV, Section 2 of the Constitution.

This point was not raised in the Statement of Points (R. 24).

Let us quote that portion of the New Jersey Statute that embodies the language involved on the point argued under Point II of the plaintiff-in-error, which provided, *inter alia*:

"Any chauffeur, operator or owner of any motor vehicle, not licensed, under the laws of the State of New Jersey, providing for the registration and licensing of motor vehicles, who shall accept the privilege extended to non-resident chauffeurs, operators and owners by law of driving such a motor vehicle or of having the same driven or operated in the State of New Jersey, without a New Jersey registration or license, shall, by such acceptance and the operation of such automobile within the

> State of New Jersey, make and constitute the Secretary of State of the State of New Jersey, his, her or their agent for the acceptance of process in any civil suit or proceeding by any resident of the State of New Jersey, against such chauffeur, operator or the owner of such motor vehicle."

Nowhere is there directed a prohibition against a non-resident from taking advantage of the New Jersey Statute.

The Statute of the State is presumed to be lawful and not prejudiced to the rights of the citizens of the several States. Inasmuch as the Statute is absolutely silent as to the query whether a non-resident may secure the benefit of the New Jersey Statute and in no way restricts the non-resident by a negative suggestion, the Statute must be construed as constitutional.

The constitutionality of this Statute could only be called into question where the State of New Jersey would refuse to recognize a suit instituted on behalf of a non-resident against another non-resident, wherein the New Jersey Statute was involved, but that is not the case here:

> "The omission of any express provision for a remedy for enforcing a right or liability is not necessarily an indication that it was not intended to be self-executing. The maxim, *ubi ibi remedium*, is as old as the law itself. Accordingly, it has been decided that if a state constitution declares that a liability shall exist in certain specified circumstances, an action may be maintained to enforce such liability, without there being any legislation upon the subject. This is upon the principle that if a constitutional right has no statute especially adapted to enforce it, by its own inherent potency it enforces itself."
>
> 6 R. C. L. Constitutional Law, par. 56, page 60;
> State *vs.* Warner, 165 Mo. 399.

And likewise it follows that:

> "To justify a court in pronouncing a legislative act unconstitutional, or a provision of a state constitution to be in contravention to the Constitution of the United States, the case must be so clear as to be free from doubt, and the conflict of the statute with the constitution must be irreconcilable, because it is but a decent respect to the wisdom, the integrity and the patriotism of the legislative body by which any law is passed to presume in favor of its validity until the contrary is shown beyond reasonable doubt. Therefore in no doubtful case will the judiciary pronounce a legislative act to be contrary to the constitution. To doubt the constitutionality of a law is to resolve the doubt in favor of its validity."
>
> 6 R. C. L. Constitutional Law, par. 73, page 75; Fairbanks *vs.* United States, 181 U. S. 283.

Even though the New Jersey Statute does not expressly give the benefits thereof to a non-resident, the right can be clearly implied.

> "An important corollary of the general principle is the rule that a statute need not be treated as unconstitutional or void for not containing an exception or qualification which the law will imply. The operation of a law in such cases may be restrained within constitutional limits without necessitating a decree that the act itself is void • • • and that where the legislature of a state has made no limitations or exception, the legal presumption is that it is intended to make none."
>
> 6 R. C. L. Constitutional Law, par. 78, pages 80-81.

Let us suppose for an instant that the New Jersey Statute actually says that, "None but residents may bring suit under it," which it clearly does not.

The Statute was naturally and primarily drawn for the protection of those within the confines of its boundaries from the dangers which might arise from the unrestricted use of the roads of the State of New Jersey by the automobiles of non-residents.

The law does not differentiate between the citizens of the State of New Jersey and the citizens of any other State. All are equally compelled to obey regulations concerning motor travel, and all are equally liable in its courts.

> "It is not a discrimination against non-residents, denying them equal protection of the law; on the contrary, it puts non-residents upon the equality with resident owners."
>
> Kane *vs.* New Jersey, 242 U. S. 160;
> Chalmers *vs.* B. & O. R. R., 207 U. S. 142.

The Statute here attacked does not abridge the privilege or immunities of citizens of the United States.

The privileges and immunities of citizens of the United States are those which owe their existence to the Federal Government, its national character, its Constitution or its laws, and it is only these privileges and immunities that are placed by this amendment under the protection of Congress. This clause of the Fourteenth Amendment did not transfer the security of a citizen's civil rights from the States to the Federal Government. Moreover, the highways of the State, to which the Statute applies, are controlled by the State under its own sovereign power and not under any delegated power of the Constitution.

> "Decisions of this Court, familiar to all, and which need not be cited, recognize the possession,

by each State, of powers never surrendered to the General Government, which power the State, except as restrained by its own Constitution or the Constitution of the United States, may exert not only for the public health, the public morals and the public safety, but for the general or common good, for the well being, comfort and good order of the people." Per Mr. Justice Harlan.

Western Turf Ass'n *vs.* Greenberg, 204 U. S. 360, 363 (1906).

The States have always enjoyed this authority. Hence the privilege of using the highways of a State by motor vehicles never was nor ever can be, under our fundamental law, a privilege common to all United States citizens, by virtue of such citizenship.

Slaughter House Cases, 16 Wall U. S. 36, 72 (1872);

New Orleans Gas Co. *vs.* La. Gas Co., 115 U. S. 650-661 (1885);

Blake *vs.* McClung, 172 U. S. 239 at 249 (1898);
Maxwell *vs.* Dow, 176 U. S. 581 at 593 (1899);
Twining *vs.* New Jersey, 211 U. S. 78, 99 (1908);
Maxwell *vs.* Bugbee, 250 U. S. 525 at 537 (1919).

When a non-resident enters the highways of another State, he does so by license or permission. The non-resident is not stopped from suing another non-resident on account of an accident arising in the State of New Jersey. The aggrieved non-resident may follow the malfeasant non-resident to the latter's own State and secure redress without difficulty. It is true the unfortunate non-resident is subjected to somewhat of a handicap if he were not able to take advantage of the New Jersey Statute.

But where the status of the injured non-resident is merely that of a user of the New Jersey highways in the

capacity of a license and is granted that license as a matter of courtesy, he cannot complain of the hardship that might be vested on him in following the other resident to the latter's State.

> "If non-residents feel the law harsh they can easily avoid its operation, so far as they are concerned, by refraining from operating their automobiles within the territorial limits of the States which have enacted such laws."
>
> Pizzutti *vs.* Wuchter, 134 Atl. 727 (1926).

> "The guaranty of equal privileges and immunities to citizens of the United States by the Fourteenth Amendment does not limit the power of the State government over the rights of its own citizens, or its power to regulate the special privileges which such State may confer on them."
>
> Steed *vs.* Harvey, 18 Utah 367;
>
> 6 R. C. L. Constitutional Laws, par. 266, page 282.

> "The State may grant special privileges to its own citizens, or it may pass laws to regulate the privileges and immunities of its own citizens, provided that in so doing it does not abridge their privileges and immunities as citizens of the United States."
>
> Paul *vs.* Virginia, 8 Wall 168, 19 U. S. (Lawyers' Edition) 357;
>
> Presser *vs.* Illinois, 116 U. S. 252;
>
> 6 R. C. L. Constitutional Laws, par. 266, page 282.

> "There are numerous privileges that may be accorded by a State to its own people in which citizens of other States may not participate except in conformity to such reasonable regulations as may be established by the State. For instance, a State cannot forbid citizens of other States to sue in its courts, that right being enjoyed by its own people;

but it may require a non-resident, although a citizen of another State, to give a bond for costs, although such bond be not required of a resident."

Blake *vs.* McClung, 172 U. S. 239.

"As between residents and non-residents, it has been held that the rights of a non-resident to sue on a parity with residents in the courts of a State is NOT one of the privileges and immunities granted to citizens of the several States by the Federal Constitution."

6 R. C. L. Constitutional Law, par. 272, page 286, line 10;

Robinson *vs.* Ocean Steam Nav. Co., 112 N. Y. 315.

"The Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adapted for these purposes gives reasonable notice and affords fair opportunity to be heard before issues are decided. Hence it is not a right, privilege or immunity of a citizen of the United States to have a controversy in a State Court procedure or determined by one form of action instead of by another."

6 R. C. L. Constitutional Law, par. 272, page 286, line 15;

Iowa *vs.* Iowa, 160 U. S. 389.

The action of the State must be treated as correct unless the contrary is clearly made to appear. Every presumption is to be indulged in favor of the validity of the Statute.

Hendrick *vs.* Maryland, 238 U. S. 610 at 624 (1914);

U. S. *vs.* Jin Fuey, 241 U. S. 394 at 401 (1916);

Graves *vs.* Minnesota, 47 Sup. Ct. 122 at 123 (1926);

Interstate Bus *vs.* Holyoke St. Ry. Co., 47 Sup. Ct. 298 (1926).

In respect to the point that the burden is imposed upon the non-residents and not upon the residents, and so unconstitutional inequality is created, it is sufficient to say that both residents and non-residents are placed upon the same footing, both are made amenable to the laws of the State, whose highways they are using.

And, finally, Mr. Justice Butler, in Hess *vs.* Pawloski, says, *inter alia*:

> "It makes no hostile discrimination against non-residents but tends to put them in the same footing as residents. *Literal and precise equality in respect of this matter is not attainable; it is not required.* (Italics mine.)
>
> Canadian Northern Ry. Co. *vs.* Eggen, 252 U. S. 553, 561, 562."

No error of law prejudicial to the fundamental rights of the plaintiff-in-error is disclosed in the record. The Court of Errors and Appeals of New Jersey heard substantially the same arguments as those addressed to this Court. In an able opinion the validity of the Statute here involved was upheld and it is respectfully submitted that the writ should be dismissed with costs.

Respectfully submitted,

JACOB R. MANTEL,
Counsel for Defendant-in-Error.

SUPREME COURT OF THE UNITED STATES.

No. 142.—October Term, 1927.

James W. Wuchter, Plaintiff in Error, vs. Michael Pizzutti. | In Error to the Court of Errors and Appeals of the State of New Jersey.

[February 20, 1928.]

Mr. Chief Justice Taft delivered the opinion of the Court.

This case involves the validity, under the Fourteenth Amendment, of a statute of New Jersey providing for service of process on non-residents of the state in suits for injury by the negligent operation of automobiles on its highways.

Pizzutti was driving a team of horses attached to a wagon on a public highway in New Jersey. Wuchter was a resident of Pennsylvania who was following the wagon with his automobile. Wuchter drove his car so as to crash into the rear of the wagon, damaging it, and injuring Pizzutti and his horses. Pizzutti instituted a suit against Wuchter in the Supreme Court of New Jersey. Wuchter was served with process under the provisions of the Act known as Chapter 232 of the Laws of 1924, (P. L. 1924, p. 517) by leaving process with the Secretary of the State. Wuchter interposed no defense. A judgment interlocutory was taken against him and a writ of inquiry of damages was issued. Although the statute did not require it, notice of its proposed execution was actually served personally on Wuchter in Pennsylvania. Wuchter did not appear. A final judgment was entered. Wuchter then appealed to the Supreme Court, contending that the Act under which the process was served upon him was unconstitutional, because it deprived him of his property without due process of law, in contravention of section 1 of the Fourteenth Amendment to the Federal Constitution.

Section 1 of the Act complained of, under which the process was served in this case, was as follows:

"From and after the passage of this act any chauffeur, operator or owner of any motor vehicle, not licensed under the laws of the

State of New Jersey, providing for the registration and licensing of motor vehicles, who shall accept the privilege extended to non-resident chauffeurs, operators and owners by law of driving such a motor vehicle or of having the same driven or operated in the State of New Jersey, without a New Jersey registration or license, shall, by such acceptance and the operation of such automobile within the State of New Jersey, make and constitute the Secretary of State of the State of New Jersey, his, her or their agent for the acceptance of process in any civil suit or proceeding by any resident of th State of New Jersey against such chauffeur, operator or the owner of such motor vehicle, arising out of or by reason of any accident or collision occurring within the State in which a motor vehicle operated by such chauffeur, or operator, or such motor vehicle is involved."

This is the first section of an Act entitled "An Act providing for the service of process in the civil suits upon nonresident chauffeurs, operators, or nonresident owners whose motor vehicles are operated within the State of New Jersey, without being licensed under the provisions of the Laws of the State of New Jersey, providing for the registration and licensing of drivers and operators and of motor vehicles, requiring the execution by them of a power of attorney to the Secretary of State of the State of New Jersey to accept civil process for them under certain conditions." The second section provides that where the car is unlicensed and there is an accident, the magistrate before whom the non-resident owner of such motor vehicle or its operator shall be brought shall require the non-resident as a condition to his release on bail or otherwise to execute a written power of attorney to the Secretary of State appointing such officer his lawful attorney for the acceptance of service in any civil suit instituted or to be instituted by any resident of the State of New Jersey against the non-resident for or on account of any claim arising out of the collision or accident.

Section 3 provides that it shall be lawful to serve civil process upon a non-resident owner in such case upon any chauffeur or operator of the vehicle while the vehicle is being operated within the state by such chauffeur or operator, and that such service may be lawfully served upon any non-resident owner by serving the process upon any person over the age of fourteen years who has custody of the automobile, whether held by him as security or driven, provided, however, that a copy of such civil process also shall be posted in a conspicuous place upon such automobile. The only provision for other than service on the persons in charge of

the car is by leaving the summons with the Secretary of State without more, under section 1 of the Act already quoted.

By the general state motor law, as amended by Chapter 211, Laws of 1924, provision is made for the registration and license of automobiles owned by non-residents who use the highways of the state (P. L. 1924, section 9, par. 4, p. 451). They are required to agree that original process against the owner made by leaving it in the office of the Secretary of State shall have the same effect as if served on the owner within the state, and the statute provides that the Commissioner of Motor Vehicles shall notify the owner of such motor car by letter directed to him at the post office address stated in his application for registration and license already filed with the Commissioner.

The Act first above referred to, No. 232, under which process in this case was served, applies to the owners of automobiles who are not licensed but who come into the state and use the highways of the state without registration and is not to be confused with the license act or its provisions.

It is settled by our decisions that a state's power to regulate the use of its highways extends to their use by non-residents as well as by residents. *Hendrick* v. *Maryland*, 235 U. S. 610, 622. We have further held that, in advance of the operation of a motor vehicle on its highways by a non-resident, a state may require him to take out a license and to appoint one of its officials as his agent, on whom process may be served in suits growing out of accidents in such operation. This was under the license act of New Jersey, last above referred to, and not No. 232. *Kane* v. *New Jersey*, 242 U. S. 160, 167. We have also recognied it to be a valid exercise of power by a state, because of its right to regulate the use of its highways by non-residents, to declare, without exacting a license, that the use of the highway by the non-resident may by statute be treated as the equivalent of the appointment by him of a state official as agent on whom process in such a case may be served. *Hess* v. *Pawloski*, 274 U. S. 352.

The question made in the present case is whether a statute, making the Secretary of State the person to receive the process, must, in order to be valid, contain a provision making it reasonably probable that notice of the service on the Secretary will be communicated to the non-resident defendant who is sued. Section 232 of the Laws of 1924 makes no such requirement and we have not

see 9 Minn LR 367, 381

been shown any provision in any applicable law of the State of New Jersey requiring such communication. We think that a law with the effect of this one should make a reasonable provision for such probable communication. We quite agree, and, indeed, have so held in the *Pavloski* case, that the act of a non-resident in using the highways of another state may be properly declared to be an agreement to accept service of summons in a suit growing out of the use of the highway by the owner of the automobile, but the enforced acceptance of the service of process on a state officer by the defendant would not be fair or due process unless such officer or the plaintiff is required to mail the notice to the defendant, or to advise him, by some written communication, so as to make it reasonably probable that he will receive actual notice. Otherwise, where the service of summons is limited to a service of the Secretary of State or some officer of the state, without more, it will be entirely possible for a person injured to sue any non-resident he chooses, and through service upon the state official obtain a default judgment against a non-resident who has never been in the state, who had nothing to do with the accident, or whose automobile having been in the state has never injured anybody. A provision of law for service that leaves open such a clear opportunity for the commission of fraud (*Heinemann* v. *Pier*, 110 Wis. 185) or injustice is not a reasonable provision, and in the case supposed would certainly be depriving a defendant of his property without due process of law. The Massachusetts statute considered in *Hess* v. *Pavloski*, really made necessary actual personal service to be evidenced by the written admission of the defendant. In *Kane* v. *New Jersey*, the service provided for by statute was by mail to the necessarily known registered address of the licensed defendant.

In determining the reasonableness of provision for service we should consider the situation of both parties. The person injured must find out to whom the offending automobile belongs. This may be a difficult task. It is easy when the operator of the automobile is present after the accident. That is provided for in the second section of this act by apprehending him or his operator. But the vehicle may be operated by someone who having committed the injury successfully escapes capture or identification. In such a case, the person injured must be left without a remedy by suit at law, as everyone must be who does not know or can not discover

the person who injured him. The burden is necessarily on him to investigate and learn. In finding out who it was, and whether the person is of such financial responsibility as to warrant a suit, he almost necessarily will secure knowledge of his post office address or his place of residence, and thereby be enabled to point out how notice may be communicated to him. With this information at hand the state may properly authorize service to be made on one of its own officials, if it also requires that notice of that service shall be communicated to the person sued. Every statute of this kind, therefore, should require the plaintiff bringing the suit to show in the summons to be served the post office address or residence of the defendant being sued, and should impose either on the plaintiff himself or upon the official receiving service or some other, the duty of communication by mail or otherwise with the defendant.

The cases, in which statutes have been upheld providing that non-resident corporations may properly be served by leaving a summons with a state official, where the corporation has not indicated a resident agent to be served, are not especially applicable to the present statute. *Pennsylvania Fire Insurance Co.* v. *Gold Issue Mining Co.*, 243 U. S. 93; *Simon* v. *Southern Ry. Co.*, 236 U. S. 115; *Old Wayne Mutual Life Association* v. *McDonough*, 204 U. S. 8. Such corporations may be properly required to accept service through a public officer as a condition of their doing business in the state. Their knowledge of the statutory requirement may perhaps prompt frequent inquiry as to suits against them, of their appointed agent or at the office of the public official to be served, but it could hardly be fair or reasonable to require a non-resident individual owner of a motor vehicle who may use the state highways to make constant inquiry of the Secretary of State to learn whether he has been sued. Even in cases of non-resident corporations, it has been held that a statute directing service upon them by leaving process with a state official is void if it contains no provision requiring the official, upon whom the service may be made, to give the foreign corporations notice that suit has been brought and citation served. *Southern Railway Co.* v. *Simon*, 184 Fed. 959, 961; *Gouner* v. *Missouri Valley Bridge Co.*, 123 La. 964. In the latter case, the Louisiana court said in respect to such a law:

"This law makes no provision whatever for the service on the defendant. The officer may decline to communicate with the person sued and give no notice whatever; not even by mail. A judgment might be obtained without the least knowledge of the

person sued. Under the phrasing of the statute, the duty of the officer begins and ends in his office. If such a judgment were rendered, it could receive no recognition whatever at the place of the domicile. When a petition can not legally be served on a defendant, the court can exercise no jurisdiction over him. The service defines the court's jurisdiction."

The question is mooted in *Simon* v. *Southern Railway*, 236 U. S. 115, 129, and the above language is quoted, but it was not found necessary to decide the point.

It is instructive in this matter to refer to state authorities to observe their view of what is valid in statutory provision for service upon proposed defendants, corporate or otherwise, where personal service can not be had. In *Nelson* v. *Chicago, Burlington & Quincy Railroad Co.*, 225 Ill. 197, the action was for personal injuries. The statute provided that service could be had upon the president of a company at the place of business in the county, but that if there was no officer in the county, then the company might be notified by publication and mail in like manner and like effect as is provided in the rules of chancery. Those rules required an affidavit showing the publication of a notice in a newspaper, and the mailing of the notice published. It was held that the service under the statute was valid as a reasonable one, for it was probable that the defendant would receive actual notice of the action before judgment was rendered against it.

In *Jefferson Fire Insurance Co.* v. *Brackin*, 140 Ga. 637, the statute provided that an action could be brought against an insurance company in the county in which the contract was made, out of which the cause of action arose, although there was no agent doing business in the county at the time. Also, that service of summons might be made by leaving a copy of the writ at the place of business of the agent at the time the cause of action accrued. The latter provision in the actual case was said to be lacking in due process for the reason that there was no reasonable probability that the company would receive notice in cases where there was no longer a place of business in the county.

In *Pinney* v. *Providence Loan & Investment Company*, 106 Wis. 396, the suit was by the grantee of a tax deed against the defendant corporation and another, as the former owners of the land, to bar their rights. The corporation was organized under the laws of the state and had its principal place of business in the county. The statute provided that corporations should file the names of of-

ficers upon whom service might be made, and that in all cases prior to the filing of such a list, service might be had by delivering and leaving with the register of deeds of the county where the corporation had its principal place of business, a copy of the papers. Service in this case was had on the register of deeds accordingly. It was held that the statute was unconstitutional; that while the state might authorize constructive service on corporations, "the method adopted should be reasonably calculated to bring notice home to some of the officers or agents of the corporation, and thus secure an opportunity for being heard".

In *Town of Hinckley* v. *Kettle River R. R. Co.*, 70 Minn. 105, there was an action against the railroad company for the recovery of certain bonds or their value. The statute provided that when a corporation created by the laws of the state did not have an officer in the state upon whom legal service of process could be made, an action might be brought in a county where the cause of action arose or the corporation had property, and a service might be made by depositing a copy of the summons in the office of the secretary of state, which should be taken as a personal service on the corporation; provided that whenever any process was served on the secretary of state, the same should be by duplicate copies, one of which should be filed in the office of the secretary of state, and the other mailed by him immediately, postage prepaid, to the office of the company, or to the president, or secretary as found by the articles of incorporation on file in the office of the state official. It was held that the statute provided for due process, there being a necessity for providing for substituted service on domestic corporations, when the officer could not be found within the state, and that the method adopted was appropriate and likely to communicate actual notice of the commencement of the action to the corporation.

In *McDonald* v. *Mabee*, 243 U. S. 90, 91, a person domiciled in Texas left the state to make his home in another state. An action for money was begun by publication in a newspaper after his departure, and a judgment recovered and sustained by the State Supreme Court was held void by this Court. This Court said:

"The foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout proceedings properly begun, and although submission to the jurisdiction by appearance may take the place of service upon the person. . . . No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance, but

the foundation should be borne in mind. Subject to its conception of sovereignty even the common law required a judgment not to be contrary to natural justice. . . . . And in states bound together by a Constitution and subject to the Fourteenth Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact". See also *Roller* v. *Holly*, 176 U. S. 398.

These cases and others indicate a general trend of authority toward sustaining the validity of service of process, if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice, and that is the principle that we think should apply here.

But it is said that the defendant here had actual notice by service out of New Jersey in Pennsylvania. He did not, however, appear in the cause and such notice was not required by the statute. Not having been directed by the statute it can not, therefore, supply constitutional validity to the statute or to service under it. *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 424, 425; *Louisville and Nashville R. R. Co.* v. *Stock Yards Company*, 212 U. S. 132, 144; *Central of Georgia Ry. Co.* v. *Wright*, 207 U. S. 127, 138; *Security Trust Co.* v. *Lexington*, 203 U. S. 323, 333; *Roller* v. *Holly*, 176 U. S. 398, 409; *Stuart* v. *Palmer*, 74 N. Y. 183, 188; *Berryhill* v. *Sepp*, 106 *Minn.* 458. For these reasons, we think that the statute of New Jersey under consideration does not make provision for communication to the proposed defendant, such as to create reasonable probability that he would be made aware of the bringing of the suit.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 142.—October Term, 1927.

James W. Wuchter, Plaintiff in Error. vs. Michael Pizzutti. } In Error to the Court of Errors and Appeals of the State of New Jersey.

[February 20, 1928.]

Mr. Justice Brandeis (with whom Mr. Justice Holmes concurs), dissenting.

The rule of general law stated by the Court seems to me sound. But I think the judgment should be affirmed. The objection sustained by the Court—that the statute is void because it fails to provide that the Secretary of State shall notify the non-resident defendant—is an objection taken for the first time in this Court. It was not made or considered below; and it is not to be found in the assignments of error filed in this Court. The only objection made or considered below was that the state court lacked jurisdiction, because the defendant had not been personally served within the State. In other words, that while the State might require the defendant to appoint the Secretary of State as his agent to receive service, as held in *Kane* v. *New Jersey*, 242 U. S. 160, service without such appointment is bad. When the case at bar was decided below, the validity of that objection was an open question. Before the case was reached for argument in this Court, *Hess* v. *Pawloski*, 274 U. S. 352, settled that process other than personal service within the state may suffice to give jurisdiction over non-resident motorists. The objection now urged—that failure to prescribe that the Secretary shall notify the non-resident denies due process—is an afterthought provoked by our decision in *Hess* v. *Pawloski*.

The nature of our jurisdiction under § 237 of the Judicial Code demands a rigorous adherence to the long established practice that objections not raised or considered below cannot be relied on here. *National Bank* v. *Commonwealth*, 9 Wall. 353, 363; *Edwards*

v. *Elliott*, 21 Wall. 532, 557; *Bolln* v. *Nebraska*, 176 U. S. 83, 89; *Detroit, Fort Wayne & Belle Isle Ry.* v. *Osborn*, 189 U. S. 383, 390-391; *Cox* v. *Texas*, 202 U. S. 446, 451; *Haire* v. *Rice*, 204 U. S. 291, 301. It is immaterial that Wuchter made a general objection that the statute violated the due process clause. Compare *Wilson* v. *McNamee*, 102 U. S. 572; *Dewey* v. *Des Moines*, 173 U. S. 193, 197-201; *Bullen* v. *Wisconsin*, 240 U. S. 625, 632. The wisdom of that rule of practice is illustrated by what has happened in the case at bar. The reversal rests wholly upon a construction given to the New Jersey statute by this Court. It construes the statute as not requiring the Secretary of State to give notice to the defendant. Whether the Court of Errors and Appeals would have so construed the statute is at least doubtful. Had the objection been made there, it is possible—and indeed probable—that the highest court of New Jersey would have construed the statute as requiring the notice. Its able opinion shows that it appreciates fully the requirements of the due process clause. See also *Redzina* v. *Provident Institution for Savings*, 96 N. J. Eq. 346.

For aught that appears, it may have been the uniform practice of the Secretary to give notice whenever the address of the defendant was ascertainable. Such an administrative construction would carry great weight with the courts of New Jersey, *State* v. *Kelsey*, 44 N. J. L. 1; *Stephens* v. *Civil Service Commission*, 101 N. J. L. 192, 194, as it would with this Court. *United States* v. *Cerecedo Hermanos y Compania*, 209 U. S. 337. Moreover, the rule that a construction which raises a serious doubt as to the constitutionality of a statute will not be adopted if some other construction is open, is a rule commonly acted upon by the courts of New Jersey, *Colwell* v. *May's Landing Water & Power Co.*, 19 N. J. Eq. 245, 249; *Atlantic City Water Works Co.* v. *Consumers Water Co.*, 44 N. J. Eq. 427, 437; *State* v. *Tuckes*, 92 N. J. L. 270, 274, as it is in this Court. *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, 217; *Arkansas Natural Gas Co.* v. *Railroad Commission*, 261 U. S. 379, 383; *South Utah Mines* v. *Beaver County*, 262 U. S. 325, 331; *Matthew Addy Co.* v. *United States*, 264 U. S. 239, 245; *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 389-390; *Lewellyn* v. *Frick*, 268 U. S. 238, 251; *Hopkins* v. *Southern California Telephone Co.*, No. 153, decided January 3, 1928. Compare *Presser* v. *Illinois*, 116 U. S. 252, 268; *Hooper* v. *California*, 155 U. S. 648, 657; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 546. As was

said in *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 369: "We ought not to indulge the presumption either that the legislature intended to exceed the limits imposed upon state action by the Federal Constitution, or that the courts of the State will so interpret the legislation as to lead to that result." See also *Chicago, Terre Haute & Southeastern Ry. Co.* v. *Anderson*, 242 U. S. 283, 287.

While this Court has power to construe the statute, it is not obliged to do so. We have often recognized the propriety of remanding a case to a state court for the determination of a delicate question of state law. *Gulf, Colorado & Santa Fe Ry. Co.* v. *Dennis*, 224 U. S. 503, 506; *Dorchy* v. *Kansas*, 264 U. S. 286, 291; *Missouri ex rel. Wabash Ry. Co.* v. *Public Service Commission*, 273 U. S. 126, 131; *Cobb Brick Co.* v. *Lindsay*, 275 U. S. —. If the judgment is to be reversed, it should be specifically for the purpose of enabling the Court of Errors and Appeals to pass upon the objection first raised by the defendant in this Court.

In the case at bar, the objection is not lack of jurisdiction, but denial of due process because the statute did not require the Secretary to notify the non-resident defendant. Notice was in fact given. And it was admitted at the bar that the defendant had, at all times, actual knowledge and the opportunity to defend. The cases cited by the Court as holding that he could deliberately disregard that notice and opportunity and yet insist upon a defect in the statute as drawn, although he was in no way prejudiced thereby, seem hardly reconcilable with a long line of authorities. *Louisville & Nashville R. R. Co.* v. *Schmidt*, 177 U. S. 230, 238-239; *Simon* v. *Craft*, 182 U. S. 427, 436-437; *Harris* v. *Balk*, 198 U. S. 215, 227-228; *Baltimore & Ohio R. R. Co.* v. *Hostetter*, 240 U. S. 620; *Aikens* v. *Kingsbury*, 247 U. S. 484, 489. For the reasons stated, I do not need to attempt to reconcile them.

Mr. Justice Stone, dissenting.

I agree that the judgment should be reversed and the cause remanded, but with leave to the state court to determine whether the notice given to the plaintiff in error by the Secretary of State was required by the statute.